

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. W. MALONEY, United States Collector of
Internal Revenue for the District of Oregon,
Appellant,

vs.

C. B. SPENCER,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

APR 27 1948

PAUL P. O'BRIEN,
CLERK

No. 11834

United States
Circuit Court of Appeals

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

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United States Attorney,

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Portland, Oregon,

For Appellant.

In the District Court of the United States
For the District of Oregon

No. Civ. 2949

C. B. SPENCER,

Plaintiff,

vs.

J. W. MALONEY, United States Collector of
Internal Revenue for the District of Oregon,
Defendant.

COMPLAINT

Comes now the Plaintiff and for cause of suit
against the above named Defendant, alleges:

I.

That at all times mentioned herein Defendant
was and now is the duly appointed, qualified and
acting Collector of Internal Revenue of the United
States for the District of Oregon, having offices
at Portland, Multnomah County, Oregon.

II.

C. B. Spencer, Plaintiff herein, is a resident of
the State of Oregon, and a citizen of the United
States.

III.

Jurisdiction of the within cause rests upon the
provisions of Judicial Code of the United States,
Section 24 as amended (28 USCA sub-division 5,

Section 41), Sections 322 and 3772 of the United States Internal Revenue Code, as amended, and the provisions of Section 23 and 122 of the Internal Revenue Code, as amended: The amount in controversy herein exceeds \$3,000.00.

IV.

That on or about June 15, 1944, Plaintiff filed with Defendant his Amended Income Tax Return for the fiscal year, March 1, 1942, to February 28, 1943, showing a tax liability of \$141,722.80.

That on or about June 15, 1944, Plaintiff filed with the Defendant his Income Tax Return for the fiscal year, March 1, 1943, to February 29, 1944, showing a tax computation of \$43,588.18, and a combined income and victory [1*] tax liability of the plaintiff in the sum of \$152,619.84 for the fiscal years ended Feb. 28, 1943, and Feb. 29, 1944.

That thereafter, and by reason of the provisions of Section 6 (c) 2 of the Current Tax Payment Act of 1943, as amended by Section 506 of the Revenue Act of 1943, Plaintiff paid to Defendant the sum of \$76,107.40 on his Return for the fiscal year ended February 28, 1943, and \$76,297.91 on his Declaration of Estimated Tax for his fiscal year ended February 29, 1944, and \$214.53 on his final Individual Tax Return for the fiscal year ended February 29, 1944, being payment in full for the fiscal years ended February 28, 1943, and February 29, 1944.

* Page numbering appearing at foot of page of original certified Transcript of Record.

V.

That during Plaintiff's fiscal year, March 1, 1944, to February 28, 1945, Plaintiff suffered a net operating loss in the amount of \$127,052.35: That of this loss the sum of \$109,910.96 represents a "net operating loss-carry back" as defined by Section 122 of the Internal Revenue Code as amended: That said net operating loss was incurred by Plaintiff in the operation of a business regularly carried on by him.

VI.

That thereafter on or about April 21, 1945, Plaintiff duly filed with the Commissioner of Internal Revenue his Claim for the refund of taxes illegally collected and retained. That said Claim was, in all respects, in due and proper form and petitioned for the refund of the sum of \$93,565.04, being the excess amount of taxes paid by Plaintiff for Plaintiff's fiscal year, March 1, 1942, to February 28, 1943, above the amount of tax due for said year by virtue of Plaintiff's net operating loss carry-back suffered during Plaintiff's fiscal year, March 1, 1944, to February 28, 1945. A copy of said Refund Claim is attached hereto and denominated "Exhibit A" and is made a part hereof as if duly set forth in this paragraph.

VII.

That more than six months have expired since the filing of the above described Claim for Refund, and the Commissioner has failed and refused to allow or to reject said Claim.

VIII.

That on or about the 21st day of April, 1945, plaintiff filed with the defendant an individual income tax return for the fiscal year ended Feb. 28, 1945, [2] showing no tax liability against the plaintiff for said fiscal year and in which return plaintiff claimed a net loss from his business for the said fiscal year in the sum of \$127,052.25.

Wherefore, Plaintiff prays for judgment against the Defendant in the sum of \$93,565.04, together with interest as provided by law, and together with his costs and disbursements incurred herein.

/s/ ROBT. T. JACOB.

/s/ JEROME S. BISCHOFF.

Counsel for Plaintiff.

[Endorsed]: Filed October 27, 1945.



EXHIBIT "A"
CLAIM

TO BE FILED WITH THE COLLECTOR WHERE AGREEMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate

COLLECTOR

(Class)

REVIEWED BY TAX ILLEGALLY COLLECTED.

REVIEWED BY AMOUNT PAID FOR STAMPS UNPAID, OR USED IN ERROR OR EXCESS.

ADJUSTMENT OF TAX AGREEMENT (not applicable to estate or income taxes).

CITY OF _____ COUNTY _____

NAME OF _____

NO.

Name of taxpayer or
purchaser of stamps

C. B. SPENCER

Business address

835 Oak Street

Salem

Oregon

Residence

TYPE
OR
PRINT

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer and that the facts given below are true and complete:

District in which return (if any) was filed Portland, Oregon

Period (if for income tax, make separate form for each taxable year) from March 1, 1942 to February

Character of assessment or tax Federal Income Tax

Amount of assessment, \$ 141,722.80; dates of payment Oct. 5, 43; Nov. 15, 43; Feb. 15,

Date stamps were purchased from the Government

Amount to be refunded \$ 93.56

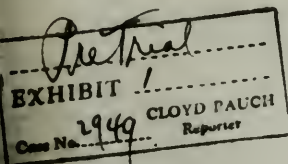
Amount to be abated (not applicable to income or estate taxes) \$

The time within which this claim may be legally filed expires, under Section 322 of the Revenue A

on May 15, 1948

The deponent verily believes that this claim should be allowed for the following reasons:

SEE ATTACHED



(Attach letter-size sheets if space is not sufficient)

Sworn to and subscribed before me this

Signed (s) C. B. SPENCER

20th day of April, 1945

(s) DOROTHY ORR

(Signature of officer administering oath)

Notary Public for Oregon

My com exps: 10-23-45

(SEE INSTRUCTIONS ON REVERSE SIDE)

"EXHIBIT A"

7

Catalog No.

Catalog No.

Catalog No.

Catalog No.

(Director)

Catalog No.

Catalog No.

Catalog No.

Catalog No.

Catalog No.

Catalog No.

- Catalog No.

File this return with Collector of Internal Revenue on or before March 15, 1945. Any balance of tax due (Item 6, below) must be paid in full with return. See separate instructions for filling out return.

FORM 1040
Treasury Department
General Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN
FOR CALENDAR YEAR 1944

1944

or fiscal year beginning March 1, 1944, and ending February 28, 1945

EMPLOYEES.—Instead of this form, you may use your Withholding Receipt, Form W-2 (Rev.), as your return, if your total income was less than \$5,000, consisting wholly of wages shown on Withholding Receipts or of such wages and not more than \$100 of other wages, dividends, and interest.

NAME C. B. SPENCER d.b.a SPENCER
(PLEASE PRINT. If this return is for a husband and wife, use both first names) PACKING COMPANY
ADDRESS 835 Oak Street
(PLEASE PRINT Street and number or rural route)
Salem, Oregon Social Security No. (if any) _____
(City or town, postal office number) (State)

Do not write in these spaces

File Code _____
Serial No. _____
Date _____
(Cashier's Stamp)

1. List your own name. If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband). List names of other close relatives with 1944 incomes of less than \$500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

NAME (Please print)	Relationship	NAME (Please print)	Relationship
Your name <u>C. B. Spencer</u>			
<u>Clara Spencer</u>	<u>Mother</u>		

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1944, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues, insurance, bonds, etc. Members of armed forces and persons claiming traveling or reimbursed expenses, see Instruction 2.

PRINT EMPLOYER'S NAME	WHERE EMPLOYED (CITY AND STATE)	AMOUNT
		\$

Enter total here → \$

3. Enter here the total amount of your dividends and interest (including interest from Government obligations unless wholly exempt from taxation)

4. If you received any other income, give details on page 3 and enter the total here (118,481.66)

5. Add amounts in items 2, 3, and 4, and enter the total here \$ (113,481.66)

If item 5 includes income of both husband and wife, show husband's income here, \$; wife's income here, \$.

IF YOUR INCOME WAS LESS THAN \$5,000.—You may find your tax in the tax table on page 2. This table, which is provided by law, is based on the same tax rates as are used in the Tax Computation on page 4. The table automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 4.

IF YOUR INCOME WAS \$5,000 OR MORE.—Disregard the tax table and compute your tax on page 4. You may either take a standard deduction of \$500 or itemize your deductions, whichever is to your advantage.

HUSBAND AND WIFE.—If husband and wife file separate returns, and one itemizes deductions, the other must also itemize deductions.

6. Enter your tax from table on page 2, or from line 15, page 4. \$ NONE

7. How much have you paid on your 1944 income tax?

(A) By withholding from your wages (Attach Withholding Receipts, Form W-2) \$ NONE

(B) By payments on 1944 Declaration of Estimated Tax. \$ NONE

Enter total here → \$ NONE

8. If your tax (item 6) is larger than payments (item 7), enter BALANCE OF TAX DUE here \$ NONE

9. If your payments (item 7) are larger than your tax (item 6), enter the OVERPAYMENT here \$

Check (✓) whether you want this overpayment: Refunded to you ☐ or Credited on your 1945 estimated tax ☐

File this return for a fiscal year, start with the date year

to which Collector's office was it sent? Portland, Oregon

to which Collector's office did you pay? Portland, Oregon

Signature defined in Item 7 (B), above

Is your wife (or husband) making a separate return for 1944?

If "Yes," write below:

Name of wife (or husband):

Collector's office to which sent:

(s) BARTHE BROWN

4-20-45

(s) C. B. SPENCER

4-20-45

Printed name (either own taxpayer or agent preparing return)

JOSEPH T. JACOB

(Print name of firm or employer, if any)

Signature of taxpayer

(If this is a joint return of husband and wife, it must be signed by both.)

SEE TAX TABLE BELOW

10-11000-1

Schedule E—INCOME FROM RENTS AND ROYALTIES				
1. Kind of property	2. Amount of rent or royalty	3. Depreciation or depletion (explain in Schedule F)	4. Rents (explain in Schedule C)	5. Other expenses (explain in Schedule C)
(see line) (col. 2 less sum of cols. 3, 4, and 5)				

TABLE 1. (continued)			
Case	Age	Sex	Location
1	24	M	London, England
2	24	M	London, England
3	24	M	London, England
4	24	M	London, England
5	24	M	London, England
6	24	M	London, England
7	24	M	London, England
8	24	M	London, England
9	24	M	London, England
10	24	M	London, England
11	24	M	London, England
12	24	M	London, England
13	24	M	London, England
14	24	M	London, England
15	24	M	London, England
16	24	M	London, England
17	24	M	London, England
18	24	M	London, England
19	24	M	London, England
20	24	M	London, England
21	24	M	London, England
22	24	M	London, England
23	24	M	London, England
24	24	M	London, England
25	24	M	London, England
26	24	M	London, England
27	24	M	London, England
28	24	M	London, England
29	24	M	London, England
30	24	M	London, England
31	24	M	London, England
32	24	M	London, England
33	24	M	London, England
34	24	M	London, England
35	24	M	London, England
36	24	M	London, England
37	24	M	London, England
38	24	M	London, England
39	24	M	London, England
40	24	M	London, England
41	24	M	London, England
42	24	M	London, England
43	24	M	London, England
44	24	M	London, England
45	24	M	London, England
46	24	M	London, England
47	24	M	London, England
48	24	M	London, England
49	24	M	London, England
50	24	M	London, England
51	24	M	London, England
52	24	M	London, England
53	24	M	London, England
54	24	M	London, England
55	24	M	London, England
56	24	M	London, England
57	24	M	London, England
58	24	M	London, England
59	24	M	London, England
60	24	M	London, England
61	24	M	London, England
62	24	M	London, England
63	24	M	London, England
64	24	M	London, England
65	24	M	London, England
66	24	M	London, England
67	24	M	London, England
68	24	M	London, England
69	24	M	London, England
70	24	M	London, England
71	24	M	London, England
72	24	M	London, England
73	24	M	London, England
74	24	M	London, England
75	24	M	London, England
76	24	M	London, England
77	24	M	London, England
78	24	M	London, England
79	24	M	London, England
80	24	M	London, England
81	24	M	London, England
82	24	M	London, England
83	24	M	London, England
84	24	M	London, England
85	24	M	London, England
86	24	M	London, England
87	24	M	London, England
88	24	M	London, England
89	24	M	London, England
90	24	M	London, England
91	24	M	London, England
92	24	M	London, England
93	24	M	London, England
94	24	M	London, England
95	24	M	London, England
96	24	M	London, England
97	24	M	London, England
98	24	M	London, England
99	24	M	London, England
100	24	M	London, England

1. Kind of property	2. Amount of rent or royalty	3. Depreciation or depletion (explain in Schedule F)	4. Repairs (explain in Schedule G)	5. Other expenses (explain in Schedule G)
- - - - -	\$ - - - - -	\$ - - - - -	\$ - - - - -	\$ - - - - -
- - - - -	- - - - -	- - - - -	- - - - -	- - - - -
- - - - -	- - - - -	- - - - -	- - - - -	- - - - -
- - - - -	- - - - -	- - - - -	- - - - -	- - - - -
(see line) (ent. 2 has sum of lines 3, 4, and 5)	\$ - - - - -	\$ - - - - -	\$ - - - - -	\$ - - - - -

Food Processing plant (2) business name Spenger Packing Company

(1) picture of business		(2) business name	
Food Processing Plant		Spencer Packing Company	
rentals, operation and financing			
and complete			
NET OF GOODS SOLD		OTHER BUSINESS DEDUCTIONS	
be used where convenience is to business-determining factor)		11. Salaries and wages not included as "Labor"	
be between "C," or "C or M," on line 11 if business any related to either or cost or market whichever is lower)		12. Interest on business indebtedness	
Inventory at beginning of year		13. Taxes on business and business property	
Merchandise bought for sale		14. Losses (explain in Schedule G)	
Other		15. Bad debts arising from sales or services	
Material and supplies		16. Depreciation from "Goodwill" and depletion (explain in Schedule F)	
Other costs (explain in Schedule G)		17. Rent, repairs, and other expenses (explain in Schedule G)	
Total of lines 2 to 6		18. Amortization of emergency facilities (attach statement)	
Inventory at end of year		19. Net operating loss deduction (attach statement)	
Net cost of goods sold (line 7 less line 8)		20. Total of lines 11 to 19	
Gross profit (line 1 less line 9)		21. Total of lines 9 and 20	
		22. Net profit (or loss) (line 1 less line 21)	

FIGURE 6 ■ **STOCK MARKET RETURNS FROM 1980 TO 1997 BY TYPE OF INVESTMENT**

gain (or loss) from sale or exchange of property other than capital assets (from separate Schedule D)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

and address of partnership, syndicate, etc.	Amount,	\$	
and address of estate or trust	Amount,		
sources (state nature)	Amount,		
Total			

6118,481	66
----------	----

	7. Estimated	8. Estimate
...		

1. Kind of property (buildings, leasehold improvements, etc.)	2. Date acquired	3. Cost or other basis (Do not include land or other nondepre- ciable property)	4. Assets fully depre- ciated in use at end of year	5. Depreciation al- lowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in ac- counting depre- ciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
See Schedule Attached								

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100
---	---	---	---	---	---	---	---	---	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	----	-----

1. Explanation	2. Amount	3. Column or Line No.	4. Explanation	5. Amount
Legal, Audit & Ins.	10,954 74			
Moving	765 61			
	11,720 35			

1040

U. S. TREASURY DEPARTMENT
Internal Revenue Service

SCHEDULE OF GAINS AND LOSSES **FROM SALES OR EXCHANGES OF (1) CAPITAL ASSETS AND (2) PROPERTY OTHER THAN CAPITAL ASSETS**

(TO BE FILED WITH THE COLLECTOR OF INTERNAL REVENUE WITH FORM 1040)

For Calendar Year 1944

For fiscal year beginning March 1, 1944, and ending Feb. 28, 1945

(See instructions on other side)

S. R. SPENCER, d/b/a SPENCER PACKING COMPANY

834 Oak Street, Salem, Oregon

(1) CAPITAL ASSETS

1. Description of property (If sold, give name of purchaser; if exchanged, give name of transferee)	2. Date acquired <i>Mo. Day Year</i>	3. Date sold <i>Mo. Day Year</i>	4. Gross sales price (net of sales charges)	5. Cost or other basis	6. Expenses of sale and cost of improvements subsequent to acquisition or March 1, 1913	7. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (attach schedule)	8. Gain or loss (column 4 plus column 6 less column 7 less the sum of columns 5 and 6)	9. Gain or loss to be taken into account a. Percentage b. Amount
---	---	-------------------------------------	---	------------------------	---	---	--	--

SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 6 MONTHS

								100	\$
								100	
								100	
								100	

Total net short-term capital gain or loss (enter in line 1, column 3, of summary below) \$

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 6 MONTHS

1. Description	2. Date acquired	3. Date sold	4. Gross sales price	5. Cost or other basis	6. Expenses of sale and cost of improvements subsequent to acquisition or March 1, 1913	7. Depreciation allowed (or allowable) since acquisition or March 1, 1913	8. Gain or loss	9. Gain or loss to be taken into account
Iron Works	1939-40	1944	5033 70	4931 60	2033 00	2135 10	50	\$ 1067 55
City Grates	1942-43	1944	13306 99	8054 50	2792 71	8045 20	50	4022 60
Fire Plant	1941	1944	70000 00	68608 53	5569 62	6961 09	50	3480 54
							50	

Total net long-term capital gain or loss (enter in line 2, column 3, of summary below) \$ 8570 69

SUMMARY OF CAPITAL GAINS AND LOSSES

1. Classification	2. Capital loss carryover (attach statement)	3. Net gain or loss to be taken into account from column 10, above		4. Net gain or loss to be taken into account from partnerships and common trust funds		5. Total net gain or loss taken into account in columns 2, 3, and 4 of this summary	
		(a) Gain	(b) Loss	(a) Gain	(b) Loss	(a) Gain	(b) Loss
Net short-term capital gain or loss		\$	\$	\$	\$	\$	
Net long-term capital gain or loss		\$ 8570 69		\$	\$	\$ 8570 69	
Net gain or loss in column 5, lines 1 and 2. (Enter on line 1, Schedule D, page 3, Form 1040.)						\$ 8570 69	XXXXX
Net gain or loss in column 5, lines 1 and 2. (The amount to be entered on line 1, Schedule D, page 3, Form 1040, is (1) this item or (2) net income, or adjusted gross income if tax is computed by use of the tax table on page 2, Form 1040, computed without regard to capital gains or losses, or (3) \$1,000, whichever is smallest.)						XXXXX	\$

COMPUTATION OF ALTERNATIVE TAX

Use only if you had an excess of net long-term capital gain over net short-term capital loss, and line 5, page 4, Form 1040, exceeds \$16,000

9. Net income (line 3, page 4, Form 1040)	\$	10. Normal tax (3% of line 9)	\$
10. Excess of net long-term capital gain over net short-term capital loss (line 2, column 5 (a), less line 1, column 5 (b), of summary above)	\$	11. Partial tax (line 6 plus line 10)	\$
11. Net income (line 1 less line 2)	\$	12. 30% of line 2	\$
12. Net income (line 4, page 4, Form 1040)	\$	13. Alternative tax (line 11 plus line 12)	\$
13. Net income (line 5, page 4, Form 1040)	\$	14. Total normal tax and surtax (line 6 plus line 10, page 4, Form 1040)	\$
14. Net income (line 3, above). (If partially tax-exempt interest is included, see Tax Computation Instructions on page 4 of Form 1040 instructions.)	\$	15. Tax liability (line 13 or line 14, whichever is the lesser). (Enter on line 11, page 4, Form 1040.)	\$
15. Net income (line 4, page 4, Form 1040)	\$		
16. Net income (line 5, page 4, Form 1040)	\$		

(2) PROPERTY OTHER THAN CAPITAL ASSETS

1. Description of property	2. Date acquired	3. Gross sales price (net of sales charges)	4. Cost or other basis	5. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913	6. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (attach schedule)	7. Gain or loss (column 3 plus column 5 less the sum of columns 4 and 6)

Total net gain (or loss) (enter on line 2, Schedule D, page 3, Form 1040) \$

If item in this schedule was acquired by you otherwise than by purchase, attach a statement explaining how acquired.

INSTRUCTIONS

(References are to the Internal Revenue Code)

GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS AND OTHER PROPERTY.—Report gains in schedule on other side.

"Capital assets" defined.—The term "capital assets" means—
(a) property held by the taxpayer (whether or not connected with his trade or business) but does NOT include—

- (a) stock in trade or other property of a kind properly includable in his inventory if on hand at the close of the taxable year;
- (b) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;
- (c) property used in the trade or business of a character which is subject to the allowance for depreciation provided in section 23(1);
- (d) real property used in the trade or business of the taxpayer;
- (e) an obligation of the U. S. or any of its possessions or of a State or Territory, or of any political subdivision thereof, or of the District of Columbia, issued on or after March 1, 1941, on a discount basis and payable without interest at a fixed maturity date not exceeding one year from the date of issue.

If the total of the distribution to which an employee is entitled under an employees' pension, bonus, or profit-sharing plan meeting the requirements of section 165 (a) is received by the employee in one taxable year, on account of the employee's separation from the service, the aggregate amount of such distributions, to the extent it exceeds the amounts contributed by the employee, shall be treated as a gain from the sale or exchange of a capital asset held for more than 6 months.

A capital gain dividend, as defined in section 362 (relating to tax on regulated investment companies), shall be treated by the shareholder as gains from the sale or exchange of capital assets held for more than 6 months.

For special treatment of gains and losses from involuntary conversion, and from sale or exchange of certain property used in the trade or business, see section 117 (j).

For special treatment of gain and loss upon the cutting of timber, or upon the disposal of timber under a contract by which the owner retains an economic interest in such timber, see section 117 (k).

Kind of property listed.—State following facts: (a) For real estate, location and description of land and improvements; (b) for bonds or other evidences of indebtedness, name of issuing corporation, particular issue, denomination and amount; and (c) for stocks, name of corporation, class of stock, number of shares, and capital changes affecting basis (including nontaxable distributions).

Basis.—In determining gain or loss in case of property acquired after February 28, 1913, use cost, except as otherwise provided in section 113. In determining GAIN in case of property acquired before March 1, 1913, use the cost or the fair market value as of March 1, 1913, adjusted as provided in section 113 (b), whichever is greater, but in determining LOSS use cost so adjusted.

Losses on securities becoming worthless.—If (a) shares of stock become worthless during the year or (b) corporate securities with interest coupons or in registered form become

worthless during the year, and are capital assets, the loss therefrom shall be considered as from the sale or exchange of capital assets as of the last day of such taxable year.

Nonbusiness debts.—If a debt, other than (a) a debt evidenced by a corporate security with interest coupons or in registered form and (b) a debt the loss from the worthlessness of which is incurred in the trade or business, becomes totally worthless within the taxable year, the loss resulting therefrom shall be considered a loss from the sale or exchange, during the taxable year, of a capital asset held for not more than 6 months. Enter such loss in column 10 of schedule of short-term capital gains and losses on other side.

Classification of capital gains and losses.—The phrase "short-term" applies to gains and losses from the sale or exchange of capital assets held for 6 months or less; the phrase "long-term" to capital assets held for more than 6 months.

"Wash sales" losses.—Losses from the sale or other disposition of stocks or securities are not deductible (unless sustained in connection with the taxpayer's trade or business), if, within 30 days before or after the date of sale or other disposition, the taxpayer has acquired (by purchase or by an exchange upon which the entire amount of gain or loss was recognized by law), or has entered into a contract or option to acquire, substantially identical stock or securities.

Losses in transactions between certain persons.—No deduction is allowable for losses from sales or exchanges of property directly or indirectly between (a) members of a family, (b) a corporation and an individual owning more than 50 percent of its stock (liquidations excepted), (c) a grantor and fiduciary of any trust, or (d) a fiduciary and a beneficiary of the same trust.

Nondeductible losses.—Losses from the sale or exchange of property are not deductible unless they are incurred in trade or business or in transactions entered into for profit.

LIMITATION ON ALLOWABLE CAPITAL LOSSES.—Losses from sales or exchanges of capital assets shall, if otherwise allowable, be allowed only to the extent of the gains from such sales or exchanges, plus either (a) the net income, or adjusted gross income if the tax is computed by use of the tax table on page 2 of Form 1040, computed in either case without regard to capital gains and losses, or (b) \$1,000, whichever is smaller. However, a net capital loss as defined in section 117 (a) (11) may be carried over to each of the five succeeding taxable years and treated as a short-term capital loss to the extent not allowed as a deduction against any net capital gains of any taxable years intervening between the taxable year in which the net capital loss was sustained and the taxable year to which carried. The amount of the net capital loss carry-over may not be included in computing a new capital loss of a taxable year which can be carried forward to the next five succeeding taxable years.

ALTERNATIVE TAX.—If the net long-term capital gain exceeds the net short-term capital loss, a taxpayer with surtax net income exceeding \$16,000 shall compute the alternative tax (see computation of alternative tax on other side). The alternative tax, if less than the normal tax and surtax computed on page 4 of Form 1040, shall be his tax liability.

Do not itemize deductions if—(1) You determine your tax from the tax table on page 2, or
(2) Your total income is \$5,000 or more and you claim the \$500 standard deduction.
If husband and wife living together at end of year file separate returns and one itemizes deductions, the other must file his or her return on Form 1040, and must also itemize deductions.

DEDUCTIONS

Describe deductions and state to whom paid. If more space is needed, list deductions on separate sheet of paper and attach to this return.

Amount

Charitable contributions	\$	
Allowable Contributions (not in excess of 15 percent of item 5, page 1)	\$	
Interest	\$	
Total Interest	\$	
Taxes	\$	
Total Taxes	\$	
Losses from fire, storm, shipwreck, or other casualty, or theft	\$	
Total Allowable Losses (not compensated by insurance or otherwise)	\$	
Medical and dental expenses	\$	
Net Expenses (not compensated by insurance or otherwise)	\$	
Enter 5 percent of item 5, page 1, and subtract from Net Expenses	\$	
Allowable Medical and Dental Expenses. See Instruction for limitation	\$	
Miscellaneous (including alimony, amortizable bond premium, special deduction for blind, etc.)	\$	
Total Miscellaneous Deductions	\$	
TOTAL DEDUCTIONS	\$	

TAX COMPUTATION—FOR PERSONS NOT USING TAX TABLE ON PAGE 2

Enter amount shown in item 5, page 1. This is your Adjusted Gross Income	(118,401.66)
Enter DEDUCTIONS (if deductions are itemized above, enter the total of such deductions; if adjusted gross income (line 1, above) is \$5,000 or more and deductions are not itemized, enter the standard deduction of \$500)	(118,401.66)
Subtract line 2 from line 1. Enter the difference here. This is your Net Income	1,000.00
Enter your Surplus Exemptions (\$500 for each person listed in item 1, page 1)	None
Subtract line 4 from line 3. Enter the difference here. This is your Surplus Net Income	None
Use the Surplus Table in instruction sheet to figure your Surplus on amount entered on line 5. Enter the amount here	None
Copy the figure you entered on line 3, above. (If line 3 includes partially tax-exempt interest, see Tax Computation Instructions)	(118,401.66)
Enter your Normal-Tax Exemption (\$500 if return includes income of only one person; otherwise see Tax Computation Instructions)	200.00
Subtract line 8 from line 7, and enter the difference here	None
Enter here 3 percent of line 9. This is your Normal Tax	None
Add the figures on lines 6 and 10, and enter the total here. (If alternative tax computation is made on separate Schedule D, enter here tax from line 15 of Schedule D)	0
If you used the \$500 standard deduction in line 2, disregard lines 12, 13, & 14, and copy on line 15 the same figure you entered on line 11	0
Enter here any income tax payments to a foreign country or U. S. possession (attach Form 1116)	\$
Enter here any income tax paid at source on tax-free covenant bond interest	\$
Add the figures on lines 12 and 13 and enter the total here	\$
Subtract line 14 from line 11. Enter the difference here and in item 6, page 1. This is your tax	None



Handed and with one Special Rate at end of table.

[illegible]

Amended June 15, 1944

UNITED STATES INDIVIDUAL INCOME TAX RETURN

Page 1
1942

OPTIONAL FORM 1040A MAY BE FILED INSTEAD OF THIS FORM IF GROSS INCOME IS REPORTED ON THE CASH BASIS FOR THE CALENDAR YEAR, IS NOT MORE THAN \$2,000, AND COMBINES PAYMENT OF TAXES, OTHER CONTRIBUTION FOR PERSONAL SERVICES, AND INTEREST ON BONDS.

FOR CALENDAR YEAR 1942

or fiscal year beginning 3-1, 1942, and ending 2-28, 1943

PRINT NAME AND ADDRESS PLAINLY. (See Instruction C)

C. B. SPENCER dba Spencer Packing Company

(Name) (Use given names of both husband and wife, if this is a joint return)

835 Oak Street

(Street and number, or rural route)

Salem

Marion

Oregon

(Post office)

(County)

(State)

Fruit Canning

(Occupation)

(Social Security number, if any)

(Name and address of employer)

(If more than one employer, attach statement showing name and address and a note received from each)

(Do not use these spaces)

File

Card

Serial

No.

District

(Cashier's Stamp)

Cash—Check—M. O.

First Payment

Item and

Instruction No.

INCOME

Amount

Deductions Expenses

(Attach statement showing amount)

1. Salaries and other compensation for personal services, \$

\$

\$

2. Dividends

3. Interest on bank deposits, notes, etc.

4. Interest on corporation bonds, etc.

\$

\$

5. Interest on Government obligations, etc.

(a) From line (h), Schedule A

\$

\$

(b) From line (i), Schedule A

\$

\$

6. Rents and royalties. (From Schedule D)

506 24

7. Annuities

ITEMS 9, 9, AND 10, BELOW (AND PAGES 3 AND 4) NEED NOT BE CONSIDERED UNLESS YOU HAVE INCOME (OR LOSSES) IN ADDITION TO ITEMS ABOVE.

(a) Net gain (or loss) from sale or exchange of capital assets. (From Schedule F)

(b) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule C)

8. Net profit (or loss) from business or profession. (From Schedule H)

192,350 07

(State total receipts, from line 1, Schedule H, \$)

9. Income (or loss) from partnerships; fiduciary income; and other income. (From Schedule I)

Total income in items 1 to 10

\$ 192,856 31

DEDUCTIONS

Contributions paid. (Explain in Schedule C)

\$ 200 00

Interest. (Explain in Schedule C)

126 32

Taxes. (Explain in Schedule C)

1,357 80

Losses from fire, storm, shipwreck, or other casualty, or theft. (Explain in Schedule C)

Bad debts. (Explain in Schedule C)

Other deductions authorized by law. (Explain in Schedule C)

Total deductions in items 12 to 17

1,684 12

Net income (item 11 minus item 18)

\$ 191,172 19

COMPUTATION OF TAX

Net income (item 19 above)

\$ 191,172 19

Less: Personal exemption.

1200 00

(From Schedule D-1)

Credit for dependents.

700 00

(From Schedule D-2)

1,900 00

Balance (surplus net income)

\$ 189,272 19

Less: Item 5 (a) above

\$ 1,400 00

Earned income credit.

1,400 00

(From Schedule E-1 or E-2)

1,400 00

Balance subject to normal tax

\$ 187,872 19

27. Normal tax (6% of item 26)

\$ 11,272 33

28. Surtax on item 23. (See Instruction 28)

130,450 47

29. Total (item 27 plus item 28)

\$ 141,722 80

30. Total tax (item 29 or line 14, Schedule F)

\$ 141,722 80

31. Less: Income tax paid at source

\$

32. Income tax paid to a foreign country or U. S. possession. (Attach Form 116)

\$

33. Balance of tax (item 30 minus items 31 and 32)

\$ 141,722 80

I/We declare, under the penalties of perjury, that this return (including any accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued under authority thereof.

(a) GARTHE BROWN

6-15-44

(Signature of person (other than taxpayer or agent) preparing return)

ROBT. T. JACOB

(Name of firm or employer, if any)

(a) C. B. SPENCER

6-15-44

(Signature of taxpayer)

(Date)

(If this is a joint return (not made by agent), it must be signed by both husband and wife. A return made by an agent must be accompanied by power of attorney. (See Instruction 9))

1. Obligations or securities	2. Amount owned at end of year including your proportionate share of such obligations held by estates, trusts, partnerships, or common trust funds	3. Interest received or accrued during the year	4. Amount of principal interest on which is exempt from taxation	5. Interest on exempt to extent of exemption, and dividends subject to certain only
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions	\$	\$	AR	=====
(b) Obligations issued prior to March 1, 1941, under Federal Farm Loan Act, or under such Act as amended			AR	=====
(c) Obligations of United States issued on or before September 1, 1917			AR	=====
(d) Treasury Notes issued prior to December 1, 1940; Treasury Bills and Treasury Certificates of Indebtedness issued prior to March 1, 1941			AR	=====
(e) United States Savings Bonds and Treasury Bonds issued prior to March 1, 1941			\$5,000	\$
(f) Obligations of instrumentalities of the United States (other than obligations to be reported in (d) above) issued prior to March 1, 1941			None	
(g) Dividends on share accounts in Federal savings and loan associations in case of shares issued prior to March 23, 1942	=====	=====		=====
(h) Total (enter as item 5 (a), page 1)				\$
(i) Treasury Notes issued on or after December 1, 1940, and obligations issued on or after March 1, 1941, by the United States or any agency or instrumentality thereof (enter amount of interest as item 5 (b), page 1)			Amount owned at end of year	Interest received or accrued during the year (subject to normal tax and surtax)
				\$

Schedule B.—INCOME FROM RENTS AND ROYALTIES. (See Instruction 6)

1. Kind of property	2. Amount	3. Depreciation or depletion (attach schedule)	4. Repairs (explain below)	5. Other expenses (itemize below)	6. Net profit (columns 2 minus sum of columns 3, 4, and 5) (enter as item 6, page 1)
Farm	\$ 4412 18	\$ 508 50	\$	\$ 3397 44	\$ 506 24
share crop					
Explanation of deductions claimed in columns 4 and 5: Labor 474.65 - Interest 1025.00 - Taxes 1642.53 Misc. Supplies and labor 255.25					

Schedule C.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 12, 13, 14, 15, 16, AND 17

1. Item No.	2. Explanation	3. Amount	1. Item No. (Continued)	2. Explanation (Continued)	3. Amount (Continued)
	State Income	\$ 1186 84			\$
	Real Estate	179 96			
		1357 80			

Schedule D.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 21 AND 22. (See Instructions 21 and 22)

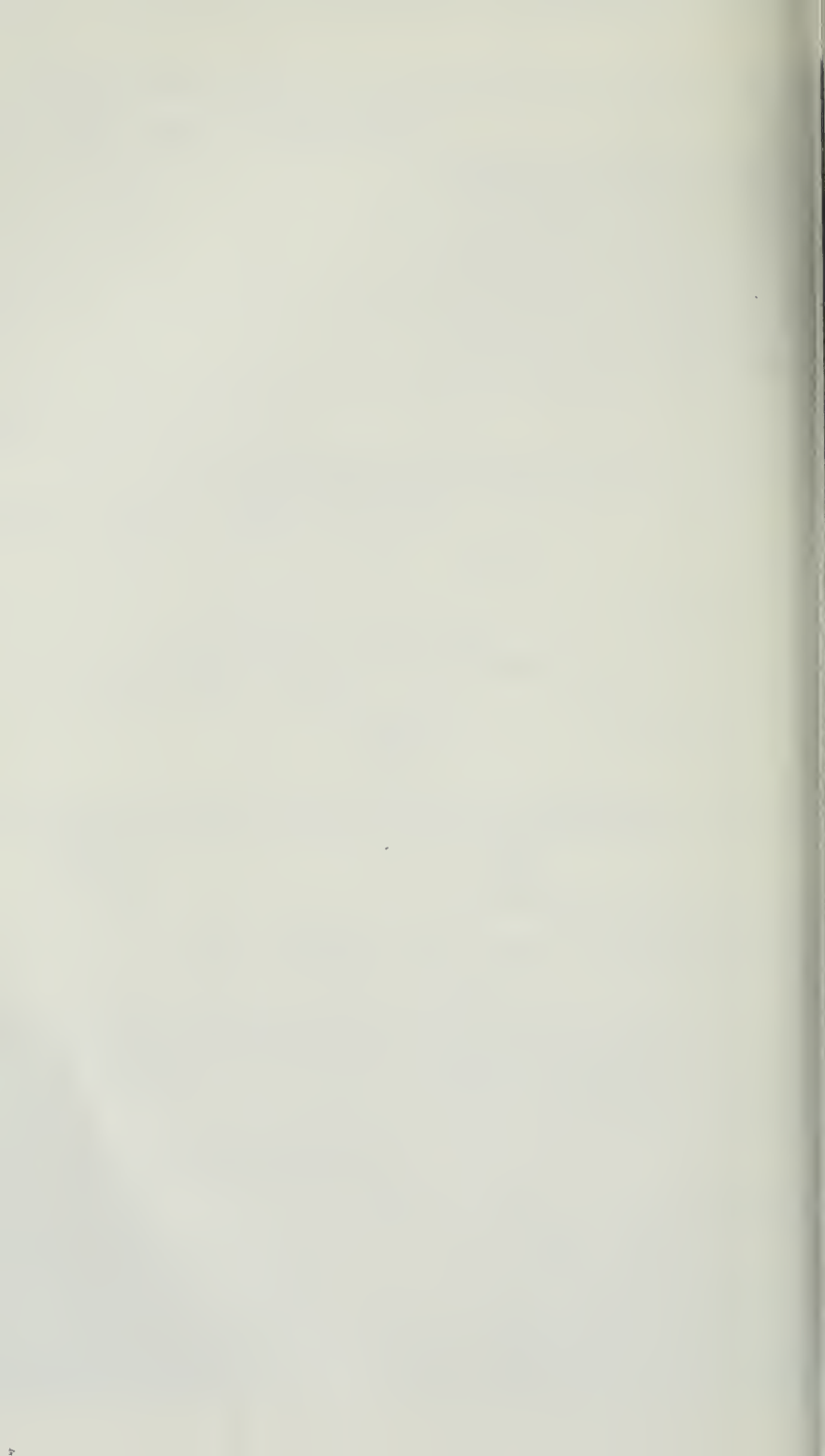
(1) Personal Exemption			(2) Credit for Dependents		
Status	Number of months during the year in each status	Credit claimed	Name of dependent and relationship	Number of months during the year Under 18 years old 18 years or over	Credit claimed
Single, or married and not living with husband or wife, and not head of family		\$	Daughter 11 yrs	12	\$ 350 00
Married and living with husband or wife	12	1200 00	Mother 79 yrs	12	350 00
Head of family (explain below)			Reason for support if 14 years or over: Unable to support self due to age.		

Schedule E.—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 25)

(1) If your net income is \$3,000 or less, use only this part of schedule	(2) If your net income is more than \$3,000, use only this part of schedule
Net income (item 19, page 1)	Earned net income (not more than \$14,000)
\$	\$ 14,000
Earned income credit (10% of net income, above)	Net income (item 19, page 1)
	\$ 191 172
	Earned income credit (10% of earned net income or 10% of net income, above, whichever amount is smaller, but do not enter less than \$300)
	\$ 3,400 00

QUESTIONS

1. Did you file a return for any prior year? <u>Yes</u> If so, what was the latest year? <u>1941</u> To which Collector's office was it sent? <u>Portland, Oregon</u>	4. Was the rate of your salary or wage increased or decreased between 3, 1942, and before the end of your taxable year?
2. If separate return was made for the current year, state: (a) Name of husband or wife (b) Personal exemption, if any, claimed thereon (c) Collector's office to which it was sent	5. Did you receive during your taxable year any amount of income from a source other than interest reported in Schedule A for the year? <u>No</u> If so, attach schedule showing amount of such income.
3. Check whether this return was prepared on the cash <input checked="" type="checkbox"/> or accrual <input type="checkbox"/> basis.	6. Did you at any time during your taxable year own any stock of a foreign corporation or a partnership organized by section 301 of the Internal Revenue Code? If so, attach statement required by Instruction E.



DETACH PAGES 3 AND 4 IF NOT USED

Page 3

Schedule F—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS. (See Instruction 8)

1. Kind of property (If property is jointly owned, state name of other owner and how interest is shared)	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Gross sales price (contract price)	5. Cost or other basis	6. Expenses of sale and cost of improvements subsequent to acquisition or March 1, 1913	7. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (explain in Schedule D)	8. Gain or loss (column 4 plus column 7 minus the sum of columns 5 and 6)	9. Gain or loss to be taken into account a. Percentage b. Amount
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 6 MONTHS								
			\$	\$	\$	\$		100 \$
								100
								100
								100

Total net short-term capital gain or loss (enter in line 1, column 3, of summary below)

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 6 MONTHS

			\$	\$	\$	\$		50
								50
								50
								50

Total net long-term capital gain or loss (enter in line 2, column 3, of summary below)

SUMMARY OF CAPITAL GAINS AND LOSSES

1. Classification	2. Net short-term capital loss of preceding taxable year (net in cases of net income for each year), but only to extent of net short-term capital gain of current year	3. Net gain or loss to be taken into account from column 10, above	4. Net gain or loss to be taken into account from partnerships and common trust funds	5. Total net gain or loss taken into account in columns 2, 3, and 4 of this summary
		(a) Gain (b) Loss	(a) Gain (b) Loss	(c) Gain (d) Loss
Total net short-term capital gain or loss	\$	\$	\$	\$
Total net long-term capital gain or loss	\$	\$	\$	\$

Net gain in column 5, lines 1 and 2. (Enter as item 8 (a), page 1)

Net loss in column 5, lines 1 and 2. (The amount to be entered as item 8 (a), page 1, is (1) this item or (2) net income, computed without regard to capital gains or losses, or (3) \$1,000, whichever is smallest)

COMPUTATION OF ALTERNATIVE TAX

Only if you had an excess of net long-term capital gain over net short-term capital loss, and item 23, page 1, exceeds \$18,000

Net income (item 19, page 1)	\$	10. Normal tax (6% of line 7)	\$
Excess of net long-term capital gain over net short-term capital loss (line 2, column 5 (a), minus line 1, column 5 (b), of summary above)	\$	11. Surtax on line 6. (See Instruction 28)	
Ordinary net income (line 1 minus line 2)	\$	12. Partial tax (line 10 plus line 11)	\$
Less: Personal exemption. (From Schedule D-1)	\$	13. 50% of line 2	
Credit for dependents. (From Schedule D-2)	\$	14. Alternative tax (line 12 plus line 13)	\$
Balance (surtax net income)	\$	15. Total normal tax and surtax (item 29, page 1)	\$
Less: Item 5 (a), page 1	\$	16. Tax liability (line 14 or line 15, whichever is the lower). (Enter as item 30, page 1)	\$
Excess income credit. (From Schedule E-1 or E-2)	\$		
Balance subject to normal tax	\$		

Schedule G—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS (See Instruction 8)

1. Kind of property	2. Date acquired	3. Gross sales price (contract price)	4. Cost or other basis	5. Expenses of sale and cost of improvements subsequent to acquisition or March 1, 1913	6. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (explain in Schedule D)	7. Gain or loss (column 3 plus column 6 minus the sum of columns 4 and 5)
		\$	\$	\$	\$	\$

Total net gain (or loss) (enter as item 8 (b), page 1)

If the family, fiduciary, or business relationship to you, if any, of purchaser of any of the items on this page

any of such items were acquired by you other than by purchase, explain fully how acquired

Schedule H.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (See Instruction 9)

1. Nature of business Fruit Canning and Packing; (2) number of places of business 2; (3) business name and address if different from name and address on page 1 Lebanon, Oregon and Yakima, Washington
 2. Receipts See Schedule 3,275,985.08

COST OF GOODS SOLD		OTHER BUSINESS DEDUCTIONS	
Inventory at beginning of year	\$219,264.99	11. Salaries and wages not included as "Labor" (do not deduct compensation for yourself)	\$12,542.42
Goods bought for sale	19,343.53	12. Interest on business indebtedness	28,803.18
Freight	305,686.31	13. Taxes on business and business property	20,646.08
Material and supplies	1,185,165.76	14. Losses (explain below)	
Other costs (itemize below)	112,247.51	15. Bad debts arising from sales or services	8,129.75
Total of lines 2 to 6	1,841,708.10	16. Depreciation, obsolescence, and depletion (explain in Schedule J)	13,330.76
Inventory at end of year	11,660.41	17. Rent, repairs, and other expenses (itemize below or on separate sheet)	170,135.05
Cost of goods sold (line 7 minus line 8)	1,830,047.69	18. Amortization of emergency facilities (attach statement)	
Gross profit (line 1 minus line 9)	\$445,937.39	19. Total of lines 11 to 18	\$253,587.24
		20. Total of lines 9 and 19	\$2,083,634.93
		21. Net profit (or loss) (line 1 minus line 20) (enter as item 9, page 1)	\$192,350.67

3. If production, manufacture, purchase, or sale of merchandise is an income-producing factor, inventories are required. Enter "C," or "C or M," on lines 4 and 5 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.
 4. Itemization of deductions claimed in lines 6, 14, and 17 See Schedule

5. If you at any time after October 3, 1942, and before the end of your taxable year have in your employ more than eight individuals? Yes
 6. If answer to second question is "Yes," attach a statement explaining all such increases or decreases. If any of these increases or decreases required the prior approval of the National War Labor Board or the Commissioner of Internal Revenue as stated in Instruction 10, also a copy of the authorization for each of such increases or decreases.

Schedule I.—INCOME FROM PARTNERSHIPS, FIDUCIARIES, AND OTHER SOURCES

INCOME FROM PARTNERSHIPS, SYNDICATES, ETC. (SEE INSTRUCTION 10 (a)) (FURNISH NAMES AND ADDRESSES)			
		\$	
		\$	
INCOME FROM FIDUCIARIES (FURNISH NAMES AND ADDRESSES)			
		\$	
		\$	
INCOME FROM OTHER SOURCES (STATE NATURE)			
		\$	
		\$	
Total amounts in Schedule I. (Enter as item 10, page 1)		\$	

Schedule J.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES K, C, AND M BY B

1. Kind of property (e.g., auto, material of which constructed)	2. Date acquired	3. Cost or other basis (Do not include land or other nondepreciable property)	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in accumulating depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
Bldgs.	1937	\$ 3,500.00		\$ 1011.11	\$2488.89	15 yr		\$ 233.33
Equip.	1941-2	2,418.41		120.00	2298.41	10 yr		241.84
Other Equip.	1942	2,000.00			2000.00	5 yr		33.33
								508.50

C. B. SPENCER

NET OPERATING LOSS CARRY-BACK

2-28-45 to 2-28-43

Gross Receipts (3-1-44; 2-28-45)..... \$ 33,562.28

Business Deductions:

Taxes on Real Estate in business..\$	1,951.01	
Interest on Loans.....	3,546.39	
Bad Debt arising from Sales & Services	107,567.51	
Depreciation	35,829.37	
Legal Audit and Insurance.....	10,954.74	
Moving Expense	765.61	160,614.63

Net Operating Loss..... (127,052.35)

Gain from sale of capital assets..... 17,141.39

Net Carry-back Loss from 2-28-45 to fiscal year ending 2-28-43, as defined by Section 122 IRC

\$(109,910.96)

1943 Fiscal—Tax Re-computation

Net Income per Amended Return (See Return attached) \$191,172.19

Less Net Operating Loss Deduction above 109,910.96

Net Income 81,261.23

Less Personal Exemption.....\$ 1,200.00

Credit for Dependents 700.00 1,900.00

Surtax Net Income 79,361.23

Less Earned Income Credit..... 1,400.00

Normal Tax Net Income..... \$ 77,961.23

Normal Tax (on \$77,961.23)..... \$ 4,677.67

Surtax (on \$79,361.23)..... 43,480.09

Tax for 1942 \$ 48,157.76

Paid on Amended Return..... \$141,722.80

Tax above 48,157.76

Net Refund due..... \$ 93,565.04

STATEMENT OF CASE

Claimant filed Individual Income Tax Returns for the years, amounts and taxes, as follows:

Fiscal Year ending February 28th	Net Income	Tax Liability
1943 (Amended Return).....	\$191,172.19	\$141,722.80
1944	72,272.84	43,588.18

By reason of the forgiveness feature of the Revenue Act of 1943, the claimant paid \$76,107.40 on his 1942 income, \$76,297.91 on his Declaration of Estimated Tax on 1943 income, and \$214.53 on his Individual Income Tax Return for the fiscal year ended February 29th, 1944.

Claimant filed an Estimate Form 1040-ES for the fiscal year ended February 28, 1945, showing no tax due. Subsequently, and on or about April 20th, 1945, claimant filed his Income Tax Return, which showed a net loss of \$118,481.66, of which \$109,910.96 represents a net operating loss carryback as defined by Section 122, Internal Revenue Code.

As a part of claimant's estimate on Form 1040-ES, for the fiscal year February 28, 1945, is the following statement:

"My principal business is conducted under the name of the 'Spencer Packing Company.' This company is operating under leases which provide for payment upon the basis of the number of cases of fruits and vegetables processed and packed. At this time, it is impossible to anticipate what the year's pack will amount to and, consequently, it is also impossible to de-

termine whether any profit at all will result from the operations. It does not now appear that there will be any net profit for the year or that there will be any tax to be paid for the year.

“My fiscal year ends February 28th.”

This statement, signed by both C. B. Spencer and Grace N. Spencer, was filed about August 3rd, 1944.

Claimant has been engaged in the food packing and processing business in various capacities throughout his entire business life, and, independently on his own behalf, since 1935. During the year 1935, claimant purchased a warehouse in the City of Lebanon, Oregon, and equipped it for canning prunes, and, in the beginning of his operation, packed this fruit for the growers upon a cost-plus basis. During the year 1936, claimant added other equipment and in addition to canning prunes, cold-packed and canned cherries, tomatoes, pumpkin, gooseberries, strawberries, raspberries, loganberries, blackberries, and also continued packing prunes as formerly, upon a cost-plus basis.

During the period from 1936 to 1940, inclusive, claimant packed all of the fruits and vegetables listed in the next preceding paragraph, the operation for this period being entirely upon a cost-plus basis. Also, during this period, as profits were made and as additional moneys were procured, additional machinery and buildings were added to the

Lebanon plant, until it had been completed and equipped as a well integrated vegetable, fruit and food packing and processing plant.

On July 24, 1940, claimant leased the food can-
nery and processing plant of Yakima Growers
Co-Op. At that time, this organization was defunct
and was not operating. During this first year,
claimant packed the products of the members of
the Co-Op for the right and privilege of using the
plant and the equipment, and in addition to pack-
ing their products, paid the Co-Op 5c per case on
all other food products packed on his own behalf.

During the years, 1941, 1942 and 1943, claimant
continued the operation of both the Lebanon and
Yakima plants upon the same basis as prior years,
except that at Yakima the growers were paid cash
for their products, together with 5c per case for the
use of their portion of the plant. In the meantime,
claimant had constructed a building of his own and
had purchased and added to that plant additional
machinery [12] and equipment which he had ac-
quired on his own behalf. In addition to modern-
izing both plants, the capacity was further increased
and expanded.

During the year 1943, at the urgent request of
the War Food Administration, claimant purchased
an unused and illy equipped dehydration plant at
Lebanon and reconstructed and rebuilt said plant
so as to develop it into a first-class food dehydrat-
ing operation. Also, during the period after Decem-
ber, 1941, the additions made to the plants at
Yakima and Lebanon were made upon the basis of

urgent requests of the Government Agencies to increase the pack for lend-lease and Military use.

Also, during the year 1943 with the addition of the plants, the increasing difficulties in getting raw products, materials and supplies, financing, and sufficient personnel, and the further fact that under the strain and pressure of the increased operation, claimant's health was beginning to break, it became obvious that it would be necessary to reorganize and revise the operations. In furtherance of this plan, it was considered proper and expedient to organize operating corporations for each of the plants. Furthermore, the financing of the Washington plant was done by Washington financial institutions, and the Oregon plants were financed by Oregon financial institutions. It was becoming increasingly difficult to complete the financing of these interstate plants without a segregation of the operations so that the obligations of each individual unit could be governed by such limitations and restrictions as were applicable to such separate, individual units. In furtherance of this plan, claimant leased his respective plants to the newly organized corporate operating units upon a per case basis in accordance with the custom of the trade. In addition, however, to the mere leasing of the plants to the corporate operations, claimant furnished as an additional service for the charge made, complete management and guaranteed the operating units adequate financing. While claimant was an officer of each of the corporations, he drew no compensation as such for the services rendered except the

per case charge, which constituted [13] the entire compensation be received for the three distinct services furnished, to-wit: the plants, management and finances.

The leases to the various plants were first drafted for a period of three years commencing March 1st, 1943, with the option of renewal. These leases were delivered to the financing organizations and in addition, were recorded with the County Clerks of Linn County, Oregon, and Yakima County, Washington. These leases contained the following paragraph:

“5. Financing: It is recognized that large sums of money will be required to finance the operations of Lessee, and Lessors hereby agree that when required they will provide (through personal guarantee and through the pledge of such of their property covered by this Lease as may be necessary) adequate financing for the needs of Lessee, as a part of the services to be performed in consideration of the rental to be paid hereunder.”

For many years, claimant's Lebanon operations had been financed through the United States National Bank of Portland (Oregon), and the Yakima operations had been financed through the Seattle First National, Yakima Branch. On October 5, 1943, the Spencer Packing Companies of Yakima and Lebanon, and C. B. Spencer (pursuant to the foregoing Lease Agreement) entered into a financing arrangement with the American Business Credit Corporation, of Portland, Oregon. As

guarantor and endorser, said C. B. Spencer became personally liable on the financing contract. Similar agreements were entered into by C. B. Spencer and the Spencer Dehydrators, Inc., and on the strength of each of these arrangements, said American Business Credit Corporation opened lines of credit.

Due to the excessively high Federal Taxes which claimant was required to pay for the fiscal years ended February 28, 1943, and February 29, 1944, and the rapid expansion of the plants to meet the requests of the Federal Agencies, and due to claimant's inability to procure sufficient personnel and adequate financing to purchase enough raw products to operate profitably (coupled with certain unfortunate experiences in fruit and vegetable losses), claimant was compelled to dispose of [14] the Yakima plant during the year 1944, and to discontinue his operations at that point.

Also due to the exactions of the Food Administration with respect to the products dehydrated at the dehydration plant in Lebanon, Oregon, that company sustained staggering losses during each year of its operations. Furthermore, the Food Administration refused to supply the dehydration operation with further orders, and on November 30, 1944, Mr. W. J. Chastain of the Food Administration, recommended to the claimant that the dehydration plant be closed. These unfortunate circumstances so increased claimant's loss that it was also necessary during the fiscal year ended February 28, 1945, to abandon the dehydration operations and to close that plant.

During the fiscal year ended February 28, 1945, the Spencer Dehydrators, Inc., and the Spencer Packing Company of Yakima were liquidated with bad debt losses as follows, which resulted from amounts owing to claimant on account of unpaid rentals, advances and amount paid on guaranty:

Spencer Dehydrators, Inc.....	\$73,601.49
Spencer Packing Co. of Yakima.....	\$33,966.02

Claimant had no source of income other than from his business of property rentals, food processing plant operation and financing of three corporations engaged solely in this work. As part of the rental agreement, the claimant pledged his assets and credit in order to finance the corporations. It constituted a step or steps in the principal business and trade, and one to which claimant regularly devoted all his time exclusively. Claimant received no salaries as officer of the three corporations, and neither did he receive dividends. He made numerous trips between his Lebanon and Yakima cannery corporations to supervise operations, arrange for financing, and keep a close check on the operations (which necessarily [15] tied up his personal fortunes as well). One of the corporations recognized a gain for the year's operations, but the other two, on liquidation, showed a substantial loss. The results of the previous years' operations warranted the claimant in believing that he would realize substantial profits in this year also.

Argument

This Claim is filed under the provisions of Section 122 of the Internal Revenue Code, which provides in part, as follows:

“(a) Definition of Net Operating Loss.—As used in this section, the term ‘net operating loss’ means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

(b) Amount of Carry-Back and Carry-Over.—

(1) Net operating loss carry-back.—If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss.

(c) Amount of Net Operating Loss Deduction.—The amount of the net operating loss deduction shall be the aggregate of the net

operating loss carry-overs and the net operating loss carry-backs to the taxable year reduced by the amount, if any, by which the net income (computed with the exceptions and limitations provided in subsection (d) (1), (2), (3), and (4)) exceeds, in the case of a taxpayer other than a corporation, the net income (computed without such deduction), or, in the case of a corporation, the normal-tax net income (computed without such deduction and without the credit provided in section 26 (e));

(d) Exceptions, Additions, and Limitations.—The exceptions, additions, and limitations referred to in subsections (a), (b), and (c) shall be as follows:

* * *

(4) Gains and losses from sales or exchanges of capital assets shall be taken into account without regard to the provisions of section [16] 117 (b). As so computed the amount deductible on account of such losses shall not exceed the amount includible on account of such gains."

In arriving at the "net operating loss" which may be carried back, the additions and limitations which are material to the loss herein claimed are subsection (d) (4) relating to capital gains.

This provision of the statute had its origin in the Revenue Act of 1918, Section 204 (a), which provided in part as follows:

"That as used in this section the term 'net loss' refers only to net losses resulting from

either (1) the operation of any business regularly carried on by the taxpayer, * * *

In the Revenue Act of 1921, the phrase "any business" was expanded to read "any trade or business." In *Hughes v. Commissioner*, 38 Fed. 759, 8 AFTR 10385 (CCA-10th, 1930), the Circuit Court of Appeals in discussing this section, said:

"This section (Sec. 204 (a)), in somewhat different language, was first enacted in 1918. The mischief it was aimed at is a matter of common knowledge. Merchants and manufacturers, and other taxpayers employing capital in their pursuits, had paid large taxes in preceding years on paper profits. Their shelves and warehouses bulged with inventories whose values had increased fabulously during the inflation period. The war had ended; deflation was forecast; war trade was at an end.

"A class of taxpayers had paid taxes on incomes reflected by inventories, an income not in fact realized. There was no one to recoup them the losses caused by the shrink in the value of their assets. This action was designed to permit such taxpayers to carry over such losses into the two succeeding years. (In the report of the 1918 law to the Senate, the Committee, speaking of this section, said:) * * *"
(Omitted, not particularly relevant.)

Montgomery, in his work on *Income Tax Procedure* (1922 Ed.) at page 1021, says of this section:

"The radical changes expected in business conditions as a result of the cessation of the

war made it seem imperative that losses arising from readjustments of inventories, which might occur within a few months thereafter should be spaced over a longer period of time. Similar conditions existed in case of losses arising from sales or depreciation of plant and equipment acquired for war purposes. To meet those difficulties the 1918 law provided certain relief measures designed to assist in the reestablishment of normal conditions.'

“* * * Considering the manifest intention of Congress to restrict the application of the section, and the evident purpose of the law, it is our opinion that the section has no application to wage-earners, salaried or professional men. Wage-earners and salaried men may be out of work and subject to no tax. But, employing no capital in their ‘trade or business regularly carried on,’ they suffer no net losses that should be carried over to other years. * * *”

In that case the petitioner, a lawyer, sustained a loss in investment banking in 1921 which he sought to carry forward to 1922. The Court held that this lawyer's business included investment banking and allowed the net loss carry-over since he spent about 20% of his time in that endeavor. By the stronger reason the contention of claimant should be allowed as he spent 100% of his time in carrying on the business involved in this claim.

Revenue statutes are to be construed strictly, and doubts in its terms are to be resolved against the Government and in favor of the taxpayer. This

rule was set forth in *U. S. v. Merriam*, 263 U. S. 179, 44 Sup. Ct. 69, 4 AFTR 3673 (1923), as follows:

“* * * But in statutes levying taxes the literal meaning of the words employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer. *Gould v. Gould*, 245 U. S. 151, 153, 38 Sup. Ct. 53, 62 L. Ed. 211. The rule is stated by Lord Cairns in *Partington v. Attorney General*, L. R. 4 H. L. 100, 122:

‘I am not at all sure that in a case of this kind—a fiscal case—form is not amply sufficient; because, as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.’”

This rule is applicable particularly to the net loss carry-over and carry-back [18] provisions of the statute, for in *Burnet, Comr. v. Marston*, 57 F. (2d) 611, 10 AFTR 1586 (CA of DC, 1932) the Court of Appeals stated:

“Section 204, being a relief measure, should ‘be construed liberally in favor of the taxpayers to give the relief it was intended to provide.’ * * * (Cases cited)” (These cases deal with other sections, and are not any improvement on the present case.)

In that case, petitioner was a member of a partnership engaged in investment banking. In 1920 the partnership was dissolved, and liquidation commenced. In 1922 petitioner made payments aggregating \$725,000 on account of losses sustained by the firm. His gross income was \$633,000, leaving a net business loss for 1922 of \$92,000. Commissioner refused to allow any part of this net loss for 1922 as a deduction against the taxpayer's income for 1923. The Board of Tax Appeals held for petitioner. On appeal, the Board was affirmed. Commissioner contended that petitioner had not been engaged in the investment banking business during 1922, and therefore that the loss was not sustained in “any trade or business.” Held, that the phrase “during the taxable year” was an interpolation by the Commissioner and does not appear in the statute. Regulation in conflict with the terms of the statute will not be sustained.

In determining the net operating loss for the fiscal year ended February 28, 1945, two deductions as follows are included:

Bad debt of Spencer Dehydrators, Inc.	\$73,601.49
Bad debt of Spencer Packing Company of Yakima.....	\$33,966.02

In accordance with the provisions of Section 122 (d)(5), Internal Revenue Code, in order for these two items to be allowable deductions in determining the net operating loss, it must appear that they are attributable to the operation of a trade or business regularly carried on by the taxpayer. That they were incurred in such a business is evident from the facts and from the law as enunciated in the following cases: [19]

In an early case, *Flint v. Stone Tracy Co.*, 220 U. S. 107, 3 AFTR 2834 (1911), our Supreme Court, in defining "business" for the purposes of the Corporation Excise Tax of 1909, said:

"'Business' is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict. 158, citing *People ex rel. Hoty v. Tax Comrs.* 23 N. Y. 242, 244. 'That which occupies the time, attention, and labor of men for the purpose of a livelihood or profit.' 1 Bouvier's Law Dict. p. 273.

"We think it is clear that corporations organized for the purpose of doing business, and actually engaged in such activities as leasing property, collecting rents, managing office buildings,

making investments of profits, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus, are engaged in business within the meaning of this statute, and in the capacity necessary to make such organization subject to the law.”

While this case involved the activities of a corporation, there are no sound reasons for applying a contrary rule to individual taxpayers.

Under the net loss carry-over provisions of the Revenue Act of 1921, the Board discussed the facts of Oscar K. Eyserbach, 10 B.T.A. 716, as follows:

“For several years prior to 1923, petitioner was engaged in the business of purchasing and developing mineral leases. The majority of these leases were oil and gas leases. In this line of business, petitioner prior to and in 1921 purchased interests in the lead and zinc leases referred to in the findings of fact and proceeded to develop one of these properties. This effort failed in 1921, after petitioner had expended \$30,000. The question presented is, was this loss a ‘net loss’ as that term is defined in section 204 of the Revenue Act of 1921? The pertinent parts of that section read: * * *

“It is to be noted that in order to constitute a ‘net loss,’ it is not necessary that taxpayer should sustain the loss in his principal business or vocation. The word ‘business’ is qualified by the word ‘any.’ The taxpayer is entitled to this

benefit where the loss is incurred in 'any trade or business regularly carried on' by him. That petitioner's activities in oil, gas, zinc and lead constitute a business seems clear. They fall within the definition of 'business' given in *Flint v. Stone Tracy*, * * *.

"That petitioner 'regularly carried on' the business of purchasing and developing zinc and lead leases is equally clear. It was not an isolated enterprise. His zinc and lead operations dovetailed with his other [20] mine operations. On this point petitioner is sustained."

The Board stressed "activity" and "regularity."

In the case at bar, the claimant since 1935 and 1942-43 has been the owner of the premises occupied during 1944 by the three canneries. He was in active control of the operations. These activities consisted of the ownership, leasing and management of the cannery properties, and the financing of the canneries. Claimant began this arrangement about March 1, 1943, and it continued throughout the balance of 1943, all of 1944, and part of 1945. Over his signature a line of credit was opened up to the three cannery corporations. This guaranty by the claimant was in accordance with the terms of the Lease and was part of the consideration whereby the corporations paid rental and had the use of the land and buildings and machinery. The Lessor and Lessee in each instance had carried on this arrangement for a year preceding the year in question. It required claimant's constant care and attention and

permitted him no other activity. It was not his avocation, but rather his full-time vocation. He acted not for any corporation, but in his own self-interest. And while so acting, he incurred the two bad debt losses mentioned hereinabove.

Obviously, if the taxpayer for his whole business career had engaged in the business of renting property and financing the tenants, there would be such continuity of business as to stamp it as a "trade or business regularly carried on by the taxpayer." Such was the situation in *Glenn M. Averill*, 20 B.T.A. 1196 (appeal dismissed 53 F. (2d) 1079 (CCA-8th, 1931)), which led the Board to say:

"* * * When an activity ceases to be isolated and assumes a continuity and importance that characterize it as an activity regularly engaged in, must necessarily depend on the facts of each particular case. Obviously, in every case a business to be regularly carried on must be characterized by a continuing activity in some field of business endeavor. The loss contemplated by the statute is an operating loss, and the party claiming it must be the operator of the trade or business in which the loss occurs. Therefore, a business regularly carried on by the taxpayer means a business regularly operated by the taxpayer on his own behalf."

In *Charles M. Bryan*, 21 B.T.A. 364, the petitioner took over the management of a truck business early in 1922. His principal business or occupation up to that time had been the practice of law, and

during 1922 he spent two hours each in the forenoon and afternoon at the truck company's office, as well as returning every evening. He still practiced law. The Board pointed out that the loss was not limited to those sustained in the principal or sole trade or business.

“* * * The text is the ‘regularity’ with which a trade or business is carried on. * * *

“* * * We think, on the whole, that petitioner was regularly engaged in the business during 1922, within the intendment of the pertinent statute, and that the loss he sustained * * * was a ‘net loss’ which may properly be applied against his net income for the year 1923.”

In that case the petitioner had engaged in the business only for 1922, one year, yet the net loss carry-over was allowed. In the case at bar the taxpayer has engaged in this particular type of business of operating food processing plants for canneries purposes for many years. The test, then, is not the number of years of carrying on the business, but rather the regularity within the loss year with which the taxpayer has engaged in the enterprise. Otherwise the Bryan decision is inexplicable.

Neither is the time spent each day in the prosecution of the endeavor the test. The Board said in *S. Rose Lloyd*, 32 B.T.A. 887, at 891:

“* * * It is not necessary that one occupy a full day each day in carrying on one's activity to be considered to be regularly engaged in

business. It is continuity of efforts devoted to the undertaking which constitutes a business regularly carried on.* * *'' (Cases cited.)

In that case the taxpayer managed and traded and sold the inheritance from her father. It was her sole source of income, and she had the office in her home. She carried on a voluminous correspondence, and personally she negotiated the sales. The Board held that she was engaged in the business of buying and selling real estate. [22]

In the case at bar, the claimant has habitually and continually spent a full day each day in carrying on his business of renting the properties, operating them, and keeping a check on the financial arrangements. Much of the time he is traveling between his Lebanon and Yakima properties. He has no other source of income or profit.

Such a schedule, multiplied by virtually every working day of the year, is susceptible of only one characterization,—“continuous effort.”

As stated hereinabove, the claimant rendered three distinct services to the corporation,—plant rental, operation and financing. His activities revolved around these. In the course of such activities, it became necessary to close down the Yakima operations and thereby lose the amounts owing to claimant.

Closely in point is the case of T. I. Crane, 17 B.T.A. 720. The Petitioner for many years had been a member of a partnership engaged in selling coal and iron on commission and the promotion and

financing of corporations. In 1916, the partnership was dissolved, but the Petitioner continued as an individual the business of financing. He made many loans, and had a staff of three who handled his affairs. He was President of one corporation and an officer of another, from each of which he got a salary. He spent one-half day each week on the companies' affairs, and the rest of the time was spent on his loans, etc. Several corporations in which the Petitioner held substantial amounts of stock failed, and the Petitioner sustained (1) losses on the sale of the stock, and (2) losses on the loans. In deciding whether these losses were incurred in a "business" so as to be used in computing a net loss under Section 204 to be carried over to 1922, the Board said:

"* * * We have held that it is not necessary that the loss result solely from the carrying on of a taxpayer's principal business, but it is sufficient if the loss results from the operation of any business if that business be one regularly carried on by the taxpayer. * * * [23]

"Respondent's position is that petitioner's sole business for the year 1921 was that of a salaried executive officer of various corporations. In reaching such a conclusion we think respondent failed to give sufficient consideration to petitioner's other activities.

"The evidence satisfies us that petitioner was engaged in the business of financing mining and related corporations, and such financing involved through investigation as a preliminary,

and regular supervision subsequent to the advancing of the money. This work took up all of his time with the exception of about one-half day a week, which was spent performing his duties as a salaried officer of two corporations. Petitioner derived profits from his business in two ways: first, the receipt of interest upon his loans, and second, the receipt of dividends upon and profits from the sale of capital stock. His losses resulted from the failure of debtor corporations to repay loans and from the sale of stock at a loss.

“From the foregoing it appears that during the year 1921 petitioner’s business was not only that of a corporate executive officer, as conceded by respondent, but he regularly carried on the business of financing mining and related corporations, which financing sometimes took the form of loans and at other times the acquisition of stock in the company, the method followed being determined by the circumstances.”

And, again in *Royal W. Irwin*, 37 B.T.A. 51, which was acquiesced in by the Commissioner, the petitioner, a lawyer, invested in mining property over a period of years, and realized a loss in 1931 when his option was terminated. He carried about half his loss forward into 1932, which was denied by the respondent. The Board, in holding for the petitioner, said:

“* * * The evidence shows, however, that the petitioner was regularly engaged in the min-

ing business in connection with this particular property during all of the period from 1922 until the termination of the agreement in 1931. He gave the work a part of his personal attention, made frequent visits to the property, received regular reports from his mining engineer, wrote frequently to the latter instructing him in the conduct of the work, and was personally responsible for all decisions. He was also engaged in other business and he failed to develop this property commercially, but those facts did not prevent him from being regularly engaged in this mining business." (Cases cited)

The fact that the claimant has devoted all his efforts into corporations in which he was financially interested, does not weaken his case at all. In *Edwin H. Conrades*, 21 B.T.A. 213, the Board said in part:

"The fact that petitioner limited the field of his loans to corporations directed by him and individual associates with whose affairs and financial standing he was familiar, does not alter the fact that in making these loans he was carrying on a personal business distinct from the business carried on by the corporations in question. There is nothing in our opinion peculiar or significant in such limitations. * * *

The fact that in making many of these loans he was, in addition to obtaining interest, safeguarding his investments by providing the funds needed by his various corporations, does

not, in our opinion, stamp the loan activities as merely an incident of his service as an officer of these various corporations or as merely incident to his ownership of corporate stock. * * *"

See also *Washburn v. Commissioner*, 51 F. (2d) 949, 10 AFTR 343 (CCA-8, 1931), reversing 16 B.T.A. 1091.

The direct result of claimant's efforts during the fiscal year ending February 28, 1945, was the loss claimed herein. Based upon the facts and the law, it is submitted that such loss was an "net operating loss" within the provisions of Section 122 of the Internal Revenue Code. It follows that this claim for refund should be allowed. [25]

[Affidavit of service by mail attached.]

[Endorsed]: Filed November 9, 1945. [26]

[Title of District Court and Cause.]

PETITION FOR EXTENSION OF TIME

Comes Now Carl C. Donough, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, and based on the affidavit attached hereto, which is by this reference made a part and parcel of this petition, moves the Court for an order for a 30-day extension of time within which to answer or otherwise plead in the above-entitled cause. The extension of time is requested upon the ground and for

the reason that the Internal Revenue Department has not complied with the request of the Attorney General of the United States by sending the files of the within cause to the said Attorney General and until said files are received we have no information upon which to prepare an answer or otherwise plead herein.

Dated at Portland, Oregon, this 29th day of December, 1945.

CARL C. DONAUGH,

United States Attorney for
the District of Oregon.

/s/ VICTOR E. HARR,

Assistant United States
Attorney. [27]

United States of America,
District of Oregon—ss.

I, Victor E. Harr, being first duly sworn, upon oath depose and say: That I am Assistant United States Attorney for the District of Oregon; that on December 21, 1945, the office of the United States Attorney received a telegram from the Attorney General's office, Washington, D. C., advising that the files in the above-entitled cause had not as yet been received from the Department of Internal Revenue; that until said files are received from the Attorney General we are not prepared to file an answer to the within cause or to otherwise plead;

that this affidavit is made in support of a petition for an extension of time within which to answer or to otherwise plead.

Dated at Portland, Oregon, this 29th day of December, 1945.

/s/ VICTOR E. HARR.

Subscribed and sworn to before me this 29th day of December, 1945.

/s/ L. JEANETTE BEAR,

Notary Public for Oregon.

My commission expires: 9-23-47.

[Endorsed]: Filed December 29, 1945. [28]

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO PETITION
FOR EXTENSION OF TIME

State of Oregon,
County of Multnomah—ss.

I, Robt. T. Jacob, being first duly sworn, depose and say: That I am one of counsel for Plaintiff in the above-entitled cause and have been counsel for a period of several years, and have full knowledge of the financial position of the Plaintiff; that the claim for refund in this case arises from a heavy operating loss by Plaintiff suffered during his fiscal year 1944 in the sum in excess of \$127,-000.00; that at the time of the occurrence of the loss the Plaintiff was already very heavily in debt because of large sums of money which he had borrowed from the American Business Credit Corporation for the purpose of making payment of his

1942 income tax; that said Plaintiff is still under very heavy financial pressure in that he has not been able to liquidate his loans from American Business Credit Corporation to whom he is indebted in the approximate sum of \$50,000.00; that, in addition, said Plaintiff is indebted for many other notes and accounts payable which he is currently unable to pay.

That since the filing for claim for refund in this case, the Bureau of Internal Revenue has not made any investigation of said claim to the knowledge of affiant, and has not contacted either affiant or Plaintiff concerning said claim; that a period of more than eight (8) months has expired since the filing of the claim for refund; that this delay has worked great hardship upon the Plaintiff.

Dated at Portland, Oregon, this 5th day of January, 1946.

/s/ ROBT. T. JACOB.

Subscribed and sworn to before me this 5th day of January, 1946.

[Seal] /s/ DOROTHY ORR,

Notary Public for Oregon.

My Commission Expires: 10-23-49.

[Endorsed]: Filed January 5, 1946. [29]

Service acknowledged of the foregoing Affidavit in Opposition to Petition of Extension of Time.

/s/ VICTOR E. HARR,

Signature.

Dated: 1/5/46. [30]

[Title of District Court and Cause.]

ANSWER

The complaint is answered (by paragraphs corresponding to the paragraphs of the complaint) as follows:

1.

Admitted.

2.

Admitted.

3.

Denied, except admitted that the amount in controversy exceeds \$3,000. It is averred that no claim for refund, sufficient to give this Court jurisdiction, was filed as required by law.

4.

Denied, except admitted that plaintiff filed on or about June 15, 1944, an amended individual income tax return for the fiscal year ending February 28, 1943, evidencing a total tax liability of \$141,722.80; admitted that plaintiff filed on or about June 14, 1944, an individual income and victory tax return for the fiscal year ending February 28, 1944, evidencing a total income and victory tax liability of \$43,588.18; admitted or averred that plaintiff paid to the Collector of Internal Revenue \$76,297.91 on or about October 8, 1943, \$1,394.59 on or about

October 8, 1943, \$76,297.91 on or about February 19, 1944, and \$214.53 on or about March 22, 1945.

5.

Denied.

6.

Denied, except admitted that plaintiff filed with the Collector of [31] Internal Revenue for the District of Oregon, on or about April 21, 1945, an instrument purporting to be a claim for refund in the amount of \$93,565.04 for the fiscal year ending February 28, 1943, and admitted that Exhibit A of the complaint is a true copy of the instrument filed.

7.

Denied, except admitted that more than six months elapsed from the filing of the alleged claim for refund and the filing of the complaint.

As a Further Defense It Is Averred That:

1.

The alleged claim or instrument purporting to be a claim for refund concerned, and is stated therein to apply to, plaintiff's fiscal year 1943.

2.

That under the provisions of the Current Tax Payment Act of 1943, more particularly Section 6 thereof, the income taxes allegedly overpaid and sought to be recovered by plaintiff in this action

are made applicable to and concerned plaintiff's fiscal year 1944, and not the fiscal year for which the alleged claim for refund was filed. It is further averred that plaintiff is not entitled to recover since there was no overpayment of income taxes for the fiscal year 1943, or for the fiscal year 1944.

3.

That this Court has no jurisdiction in that no adequate or sufficient claim for refund was filed as required by law.

Wherefor having fully answered, defendant prays judgment dismissing plaintiff's complaint and for costs.

HENRY L. HESS,
United States Attorney.

/s/ VICTOR E. HARR,
Assistant United States
Attorney.

/s/ THOMAS R. WINTER,
Special Assistant, United
States Attorney.

Copy received Jan. 28/46. Jerome S. Bischoff.

[Endorsed]: Filed January 28, 1946. [32]

[Title of District Court and Cause.]

MOTION FOR PRELIMINARY HEARING
AS TO JURISDICTIONAL DEFENSE

Comes now the Plaintiff above named and through Jerome S. Bischoff, one of his counsel, and moves the Court for an order under the provisions of Rule 12 (d) setting a time for a preliminary hearing before trial as to the merits of the alleged jurisdictional defense contained in Defendants "further defense" on the ground that said defense alleges this Court has no jurisdiction of the within action for failure of Plaintiff to file a sufficient claim for income tax refund as required by law.

Plaintiff requests that a hearing be held on Monday, February 18th, or such time thereafter as may suit the convenience of the Court.

/s/ JEROME S. BISCHOFF,
Counsel for Plaintiff.

Service accepted this 4th day of February, 1946.

/s/ VICTOR E. HARR,
Asst. U. S. Atty.

[Endorsed]: Filed February 5, 1946. [33]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

The above-entitled action came on regularly for pre-trial conference before the Honorable James Alger Fee, one of the Judges of the above-entitled Court. Plaintiff appeared by and through Robert T. Jacob and Jerome S. Bischoff, his attorneys; defendant appeared by and through Henry L. Hess, United States Attorney, Victor E. Harr, Assistant United States Attorney, and Thomas R. Winter, Special Assistant to the United States Attorney.

Agreed Facts

I.

C. B. Spencer, plaintiff, is a citizen of the United States, residing in the State of Oregon, and during all times herein concerned, defendant was, and now is, the duly appointed, qualified and acting Collector of Internal Revenue for the District of Oregon.

II.

The amount in controversy exceeds the sum of \$3,000.00

III.

On or about June 15, 1944, plaintiff filed an amended individual income tax return for the fiscal year ending February 28, 1943, evidencing a total tax liability of \$141,722.80; that on or about June 15, 1944, plaintiff filed an individual income and victory tax return for the fiscal year ending February 28, 1944, evidencing a total income and victory tax lia-

bility of \$43,588.18; that the plaintiff paid to the defendant, Collector of Internal Revenue for the District of Oregon, \$76,297.91 on or about October 8, 1943; \$1,394.59 on or about October 8, 1943; \$76,297.91 on or about February 19, 1944, and \$214.53 on or about March 22, 1945. [34]

IV.

That on or about April 21, 1945, the plaintiff filed with the defendant, Collector of Internal Revenue for the District of Oregon, an instrument purporting to be a claim for refund in the amount of \$93,565.04. Said instrument is attached to the complaint as Exhibit "A" and is a true copy of the instrument filed.

V.

More than six months elapsed from the filing of said instrument to the date of filing of the present action and no notice of allowance or disallowance was received by the plaintiff during such period.

Contention of the Parties

Defendant contends that the alleged claim or instrument purporting to be a claim for refund concerned, and is stated therein to apply to, plaintiff's fiscal year 1943; that under the provisions of the Current Tax Payment Act of 1943, more particularly Section 6 thereof, the income taxes allegedly overpaid and sought to be recovered by plaintiff in this action are made applicable to and concerned plaintiff's fiscal year 1944, and not the fiscal year for which the alleged claim for refund was filed.

That for the above reasons this Court has no jurisdiction in that no adequate or sufficient claim for refund was filed, as required by Section 3772 of the Internal Revenue Code (Title 26 U. S. C. A.).

Plaintiff's position is that the carryback refund is applied to the income tax paid for the second taxable year preceding the loss; that is, the tax paid on account of income earned during the year March 1, 1942, to February 28, 1943, and accruing in that year. Plaintiff claims that the answer to Question 2 on Form 843 correctly states the taxable "period" for year and, secondly, that even if the face sheet is ambiguous or in error in the designation of the "period," that the body of the claim fully sets out all pertinent facts sufficient to enable the Commissioner to make an accurate determination of the nature of the claim, the taxable period involved, dates of payments, and any and every other element necessary to enable him to make a determination.

Issues of Fact to Be Determined

I.

There are no issues of fact to be determined on the question of the [35] merits of the alleged jurisdictional defense.

Issues of Law to Be Determined

Whether the alleged claim or instrument purporting to be a claim for refund is an adequate or sufficient claim for refund, as required by Section 3772 of the Internal Revenue Code and the regulations established in pursuance thereof.

Pretrial Exhibits

I. Refund Claim and Exhibits contained therein.
(Attached to Complaint.)

II. Individual Income and Victory Tax Return,
C. B. Spencer, for year ending 2/29/44.

The foregoing pretrial order relates solely to the question of jurisdiction. The order shall not be amended unless by consent of the parties or to prevent manifest injustice. When the issue of jurisdiction has been determined the court may proceed to the settlement of another pretrial order relating to other issues.

Dated at Portland, Oregon, this 4th day of March, 1946.

JAMES ALGER FEE,
United States District Judge.

Approved:

/s/ HENRY L. HESS,
United States Attorney.

/s/ VICTOR E. HARR,
Assistant United States
Attorney.

/s/ THOMAS R. WINTER,
Special Assistant to the
United States Attorney.

/s/ JEROME S. BISCHOFF,
Attorneys for Plaintiff.

[Endorsed]: Filed March 4, 1946. [36]

[Title of District Court and Cause.]

NOTICE

To: The Clerk of the Above Entitled Court

Will you kindly enter the name of Randall S. Jones as an associate counsel of record for the Plaintiff in the above entitled case?

/s/ R. T. JACOB,

Attorney for Plaintiff.

Service Accepted this 23rd day of September, 1946.

/s/ VICTOR E. HARR,

Attorney for Defendant.

[Endorsed]: Filed September 23, 1946. [37]

[Title of District Court and Cause.]

NOTICE TO PRODUCE

To: J. W. Maloney, United States Collector of Internal Revenue for the District of Oregon, Defendant, and Henry L. Hess, United States Attorney, Victor E. Harr, Assistant United States Attorney, Thomas R. Winter, Special Assistant, United States Attorney, Attorneys for Said Defendant:

You, and each of you, will please take notice that the Plaintiff requests you to produce at the pretrial conference on the above entitled action each and all of the following documents, to-wit:

1. The amended individual federal income tax return of C. B. Spencer d.b.a. Spencer Packing Company, prepared on form 1040, for the fiscal year beginning March 1, 1942, and ending February 28,

2. The individual federal income tax return of C. B. Spencer d.b.a. Spencer Packing Company, prepared on form 1040, for the fiscal year beginning March 1, 1943, and ending February 29, 1944.

3. The individual federal income tax return of C. B. Spencer d.b.a. Spencer Packing Company, prepared on form 1040, for the fiscal year beginning March 1, 1944, and ending February 28, 1945.

4. The claim of C. B. Spencer for the refund of tax illegally collected in the amount of \$93,565.04 filed with the Collector of Internal Revenue for the District of Oregon on or about April 21, 1945, a copy of which said claim marked Exhibit A is attached to and made a part of [38] Plaintiff's complaint herein.

And in the event of your failure to produce said document, the Plaintiff will introduce secondary evidence of the same.

/s/ R. T. JACOB,

/s/ RANDALL S. JONES,

Attorneys for the Plaintiff.

State of Oregon,
County of Multnomah—ss.

Due service of the within Notice to Produce is hereby accepted in Multnomah County, Oregon, this 18th day of October, 1946, by receiving a copy thereof, duly certified to as such by Randall S. Jones, of Attorneys for Plaintiff.

/s/ EDWARD B. TWINING,

Attorney for Defendant.

[Endorsed]: Filed October 18, 1946. [39]

[Title of District Court and Cause.]

MOTION TO CONTINUE PRE-TRIAL
CONFERENCE

Comes now J. W. Maloney, United States Collector of Internal Revenue for the District of Oregon, defendant, by Thomas R. Winter, Special Assistant to the United States Attorney for the District of Oregon, one of his attorneys, and moves the Court for an order continuing the pre-trial conference in the above case to on or after December 30, 1946.

In support of said motion, there is attached hereto an affidavit of said Thomas R. Winter, setting forth the grounds upon which said motion is based.

/s/ THOMAS R. WINTER,
Special Assistant to the United States Attorney for
the District of Oregon.

Copy received October 28, 1946.

/s/ R. T. JACOB.

[Endorsed]: Filed October 28, 1946.

State of Oregon,
County of Multnomah—ss.

Thomas R. Winter, being first duly sworn on oath, deposes and says that he is Special Assistant to the United States Attorney for the District of Oregon, and, as such, is charged with conducting the defense of this action.

The case involves the question of whether the plaintiff is entitled to a refund for the fiscal year

ended February 28, 1943, by reason of a net operating loss alleged to have been suffered in the fiscal year ended February 28, 1945, and to constitute a "net operating loss carryback," as defined by [40] Section 122 of the Internal Revenue Code, as amended. This action, therefore, necessitated the examination of the plaintiff's income tax returns for the fiscal years ended February 28, 1943, February 29, 1944, and February 28, 1945.

There is also pending in the Tax Court of the United States a case entitled *C. B. Spencer vs. War Department Price Adjustment Board*, Docket No. 270R. The petition in that case was filed August 13, 1945, and the petitioner, plaintiff here, seeks a re-determination of his "excessive profits," it being stated in the petition that the "alleged excessive profits determined by the respondent are in the sum of \$25,000 and such determination relates to petitioner's operations for the fiscal year ended February 28, 1943"; that any adjustment in that proceeding must be taken into account in this action now pending in this Court, wherein the plaintiff alleges he is entitled to the benefits of a net loss carry back for the year 1945.

That since the investigation of the plaintiff's income tax returns for the fiscal years ended February 28, 1943, February 29, 1944, and February 28, 1945, and since the setting of this case for pre-trial conference, information has been received that there was paid to Alice Barry, alias Mrs. Alice B. Spencer, Yakima, Washington, through H. G. Bauer Company, sole Sales Agent for the plaintiff, C. B. Spen-

cer, d.b.a. Spencer Packing Company, during the year 1943, the sum of \$9,500, which sum, it is indicated, was in truth and in fact the income of the plaintiff and was fraudulently omitted from his return.

That this matter is now under investigation by the investigating officers of the Bureau of Internal Revenue and it is believed their investigation and report cannot be completed prior to December 30, 1946.

That affiant is informed and believes that the investigation will disclose plaintiff has understated his income during one or all of the years here involved, and it will be necessary to file an amended answer and cross-complaint in the above action in order to protect the interests of the defendant and the United States and in order to avoid multiplicity of suits and properly adjudicate the plaintiff's tax liability.

Affiant further states that the issues as now formed are to be amended and that to require a pre-trial conference on the date set is prejudicial and not to the best interests of the parties to the action.

As additional and further grounds for the continuance of the pre-trial conference, affiant states that on or about October 18, 1946, there was served on the office of the United States Attorney a notice to produce certain documents, but the same was not received in affiant's office until October 21, 1946; that the documents called for are not in the possession of the United States Attorney or affiant and certified photostat copies of these original documents must be secured from Washington, D. C., and it is, therefore, impossible for these documents to be produced in

time for the pre-trial conference, as now set, but they will be secured as soon as possible.

/s/ THOMAS R. WINTER.

Subscribed and sworn to before me this 28th day of October, 1946.

[Seal] /s/ V. E. HARR,

Notary Public in and for the State of Oregon, Residing in Portland, Oregon.

My Commision Expires January 7, 1947.

[Endorsed]: Filed October 28, 1946. [42]

[Title of District Court and Cause.]

MOTION

The United States of America moves the Court for an Order permitting it to Interplead in this case for the purpose of asserting affirmatively a claim against C. B. Spencer, Plaintiff herein for income taxes and penalties of \$12,382.35 representing a net deficiency of Federal Income Taxes and penalties for the period involved in this action, which are due, owing, and unpaid.

Dated at Portland, Oregon, this 17th day of December, 1946.

/s/ HENRY L. HESS,

United States Attorney.

/s/ THOMAS R. WINTER,

/s/ JAMES P. GARLAND,

Special Assistants to the

Attorney General.

[Endorsed]: Filed December 17, 1946. [43]

[Title of District Court and Cause.]

ORDER

The United States of America having moved to interplead;

It Is Ordered that the United States of America may interplead in this action.

Dated at Portland, Oregon, this 17th day of December, 1946.

/s/ CLAUDE McCOLLOCH,

District Judge.

[Endorsed]: Filed December 17, 1946. [44]

In the District Court of the United States
for the District of Oregon
Civil Action No. 2949

C. B. SPENCER,

Plaintiff,

vs.

J. W. MALONEY, United States Collector of Internal Revenue for the District of Oregon,
Defendant,

UNITED STATES OF AMERICA,

Interpleader.

AMENDED ANSWER FOR J. W. MALONEY
AND ANSWER FOR UNITED STATES OF
AMERICA.

The complaint is answered (by paragraphs corresponding to the paragraphs of the complaint) as follows:

1.

Admitted

2.

Admitted.

3.

Denied, except admitted that the amount in controversy exceeds \$3,000. It is averred that no claim for refund, sufficient to give this Court jurisdiction, was filed as required by law.

4.

Denied, except admitted that plaintiff filed on or about June 15, 1944, an amended individual income tax return for the fiscal year ending February 28, 1943, evidencing a total tax liability of \$141,722.80; admitted that plaintiff filed on or about June 14, 1944, an individual income and victory tax return for the fiscal year ending February 28, 1944, evidencing a total income and victory tax liability of \$43,588.18; admitted or averred that plaintiff paid to the Collector of Internal Revenue \$76,297.91 on or about October 8, 1943, \$1,394.59 on or about October 8, 1943, \$76,297.91 on or about February 19, 1944, and \$214.53, on or about March 22, 1945 [45]

5.

Denied.

6.

Denied, except admitted that plaintiff filed with the Collector of Internal Revenue for the District of Oregon, on or about April 21, 1945, an instrument purporting to be a claim for refund in the amount of \$93,565.04 for the fiscal year ending February 28, 1943, and admitted that Exhibit A of the complaint is a true copy of the instrument filed.

7.

Denied, except admitted that more than six months elapsed from the filing of the alleged claim for refund and the filing of the complaint.

As a Further Defense It Is Averred That:

1.

The alleged claim or instrument purporting to be a claim for refund concerned, and is stated therein to apply to, plaintiff's fiscal year 1943.

2.

That under the provisions of the Current Tax Payment Act of 1943, more particularly Section 6 thereof, the income taxes allegedly overpaid and sought to be recovered by plaintiff in this action are made applicable to and concerned plaintiff's fiscal year 1944, and not the fiscal year for which the alleged claim for refund was filed. It is further averred that plaintiff is not entitled to recover since there was no overpayment of income taxes for the fiscal year 1943, or for the fiscal year 1944.

3.

That this Court has no jurisdiction in that no adequate or sufficient claim for refund was filed as required by law.

Further Affirmative Defense

1.

That there was duly assessed a net deficiency of income taxes and penalties against C. B. Spencer,

plaintiff herein, on or about December 10, 1946, of \$12,382.35, which is now due, owing and unpaid. That said deficiency was based on the determination by the Commissioner of Internal Revenue, that sums of money in the aggregate amount of not less than \$22,498.05 received by Alice Barry Spencer during times relative hereto represented taxable income of C. B. Spencer. That C. B. Spencer directed such income to be paid to Alice Barry Spencer with intent to evade Federal Income Taxes.

2.

That plaintiff has not over-paid his Federal Income Taxes for the period involved in this action, but on the contrary has under-paid his taxes for the period here involved to the extent of not less than \$12,382.35. That any judgment which may be rendered in favor of the plaintiff in this action should be reduced by said amount of taxes and penalties assessed, outstanding, and unpaid.

Counter Claim of Defendant, United States of
America

1.

The defendant, United States of America, herein alleges all the allegations contained in paragraph 1 of the preceding affirmative defense to the same extent as if such allegations were set forth herein in full.

2.

That the United States of America is entitled by reason of the above alleged assessments to affirmative judgment against C. B. Spencer, plaintiff herein, in the amount of \$12,382.35.

Wherefore, having fully answered, defendant J. W. Maloney prays judgment dismissing the plaintiff's complaint and for costs in the alternative, defendant, J. W. Maloney prays a set-off against any judgment which might be rendered in plaintiff's favor in the sum of \$12,382.35 with interests.

Defendant, the United States of America, prays an affirmative judgment against C. B. Spencer in the sum of \$12,382.35 with interests.

HENRY L. HESS,

United States Attorney.

THOMAS R. WINTER,

JAMES P. GARLAND,

Special Assistants to the
Attorney General.

[Endorsed]: Filed December 17, 1946. [47]

[Title of District Court and Cause.]

REPLY TO COUNTER-CLAIM OF
THE INTERPLEADER

For a First Reply to said counter-claim plaintiff denies and alleges:

1. Replying to paragraph 1 of said counter-claim plaintiff denies each and every allegation in-

corporated by reference in said paragraph, except that the alleged deficiency assessment of \$12,382.35 has not been paid and was based upon some purported determination of the Commissioner of Internal Revenue; and particularly denies that there was duly assessed a net deficiency of income tax and penalties in the sum of \$12,382.35, or any other sum, and that said sum, or any other amount, is now due and owing by him on account of said alleged assessment; and alleges he has no knowledge or information sufficient to form a belief as to the truth of the averment that Alice Barry Spencer received not less than \$22,485.05 during the times referred to in said counter-claim, and therefore denies that she received said amount or any other sum during said times; and further particularly denies that any sums of money, or parts thereof, received by said Alice Barry Spencer represented taxable income of the plaintiff.

2. Denies all of the allegation of said paragraph 2 of said counter-claim, and particularly denies that interpleader is entitled to receive from the plaintiff the sum of \$12,382.35 or any other amount by reason of the matters alleged in said counter-claim. [48]

For a Second Reply to said counter-claim plaintiff alleges:

No sum of money, or any part thereof, received by Alice Barry Spencer represented income upon which

the plaintiff is liable to the United States of America for income taxes. The alleged determination of the Commissioner of Internal Revenue, alleged by reference in the counter-claim, is based upon the erroneous theory that sums of money received by Alice Barry Spencer represented taxable income of C. B. Spencer. Consequently, the said alleged determination of the Commissioner of Internal Revenue is in all respects erroneous and illegal, and the alleged assessment of the deficiency in income taxes and penalties against the plaintiff based on said determination, also alleged by reference in said counterclaim, is in all respects erroneous and illegal.

Wherefore, Plaintiff demands that the United States take nothing by its said counter-claim, that the same be dismissed and that the plaintiff have and recover its costs and disbursements herein incurred.

JACOB, JONES & BRONN,
/s/ RANDALL S. JONES,
Attorneys for Plaintiff.

State of Oregon,
County of Multnomah—ss.

Due service of the within Reply is hereby accepted in Multnomah County, Oregon, this 28th day of February, 1947, by receiving a copy thereof, duly certified to as such by Randall S. Jones, one of the Attorneys for the Plaintiff.

/s/ HENRY L. HESS,
United States Attorney for
the District of Oregon.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly for trial on the 17th day of December, 1946, before the Honorable Claude McColloch, Judge of the above-entitled Court, plaintiff appearing in person and by his attorneys, Robert T. Jacob and Randall S. Jones, and defendant appearing by his attorneys, Thomas R. Winter, Special Assistant to the United States Attorney, and James P. Garland, Special Assistant to the United States Attorney General; trial was had without the intervention of a jury, the jury being waived in the manner provided by Rule 38 (d) of the Rules of Civil Procedure, stipulations by and between the parties hereto with respect to certain facts were dictated into the record of this action, witnesses were sworn and testified and exhibits were introduced in evidence, thereafter the case was continued to February 25, 1947, at which time depositions and further exhibits were introduced in evidence by the defendant, and based upon the admissions in the pleadings, said stipulations, testimony and evidence, after due consideration, the Court makes the following:

Findings of Fact

I.

At and during all times hereinafter mentioned C. B. Spencer, plaintiff, was and now is a resident of

the State of Oregon. During the taxable year ended February 28, 1943, and prior thereto plaintiff was engaged in the business of operating a cannery in the State of Oregon, and another cannery in the State of Washington. During the taxable years ended February 29, 1944, and February 28, 1945, plaintiff was engaged in the business of acquiring, owning, expanding, equipping and leasing food processing plants and providing, through guarantee and otherwise, adequate financing of the operations of such plants; and the said business during said times was regularly carried on by the plaintiff for profit. [50]

II.

At and during all the times hereinafter mentioned defendant was, and now is, the duly appointed, qualified and acting United States Collector of Internal Revenue for the District of Oregon.

III.

Jurisdiction of the within cause rests upon the provisions of Judicial Code of the United States, Sec. 24 as amended (28 USCA subdivision 5, Sec. 41), Sections 322 and 3772 of the United States Internal Revenue Code, as amended, and the provisions of Sections 23 and 122 of the Internal Revenue Code, as amended.

IV.

At and during all the times hereinafter mentioned plaintiff kept his books of account and made his income tax returns on the accrual and fiscal year

basis, and his fiscal year began on the first day of March of each calendar year and ended on the last day of the following February.

V.

On or about June 15, 1944, plaintiff filed with the defendant an amended individual income tax return (form 1040) for the taxable year ended February 28, 1943, evidencing a total income tax liability of plaintiff in the sum of \$141,722.80 for said year. On or about June 15, 1944, plaintiff filed with the defendant an individual income and victory tax return (form 1040) for the taxable year ended February 29, 1944, evidencing a combined income and victory tax liability of the plaintiff in the sum of \$152,619.84 for the taxable period beginning March 1, 1942, and ended February 29, 1944. Plaintiff paid to the defendant \$76,297.91 or on about October 8, 1943, \$1,394.59 on or about October 8, 1943, \$76,297.91 on or about February 19, 1944, and \$214.53 on or about March 22, 1945. Said payments fully paid all the tax liability of plaintiff evidenced by said tax returns.

VI.

On or about the 21st day of April, 1945, plaintiff filed with the defendant individual income tax return (form 1040) for the taxable year ended February 28, 1945, evidencing no tax liability against the plaintiff for said taxable year, but on the contrary evidencing a net loss for said taxable year in the sum of \$127,052.35, incurred in plaintiff's said business. [51]

VII.

The United States Commissioner of Internal Revenue caused all of the above-mentioned tax returns to be examined, and a revenue agent's report dated February 13, 1946, was made of said examination, in which said report, among others, the following adjustments were made in plaintiff's taxable income, to-wit:

- (a) The amount deductible for depreciation in the fiscal year ended February 28, 1945, is reduced by the sum of \$4,211.48, to-wit: from \$35,829.37 to \$31,617.89.
- (b) The amount deductible for depreciation in the taxable year ended February 29, 1944, is increased by the amount of \$4,211.48, to-wit: from \$19,971.16 to \$24,182.64. This adjustment and the one in sub-paragraph a. above are on account of the shortened amortization period authorized by a duly issued certificate of non-necessity.
- (c) The refund to plaintiff of \$687.62 previously paid by him on Oregon income tax is added to the plaintiff's income tax taxable income for the year ended February 29, 1944, (with respect to victory tax taxable income, see Finding IX and Con. VII).
- (d) The additional sums of \$224.32, \$1,558.24, \$1,126.11 and \$269.90 totaling \$3,278.57 are added to taxable income for the fiscal year ended February 28, 1943, the first said amount being a sum that should be trans-

ferred from surplus to income; the second said amount being an adjustment of a deduction for Washington Sales Tax, and the two last-mentioned amounts being capital items that had been erroneously charged to expense.

- (e) The sum of \$186.22 is added to the amount allowed as depreciation for the taxable year ended February 28, 1943.

Each and all of the foregoing adjustments are proper and correct and were accepted as such by the parties hereto. The facts bearing upon all other adjustments made in said report insofar as material to the issues of this case are herein elsewhere set forth.

VIII.

During the taxable year ended February 28, 1945, Spencer Dehydrator, Inc., an Oregon corporation, owed the plaintiff the sum of \$61,115.48, on account of accounts payable of said corporation which plaintiff had previously guaranteed and did pay, and on account of notes payable of said corporation upon which plaintiff was surety and which plaintiff did pay (except for the sum of \$3.68 which was credited to plaintiff's income on February 28, 1946, and was disregarded at the trial and beyond this mention is also disregarded in these findings). And, during said taxable year Spencer Packing Company of Yakima, a Washington corporation, owed the plaintiff the sum of \$33,966.02 on account of unpaid rent, sums advanced by plaintiff to said corporation to pay promissory notes of said corporation upon

which plaintiff was surety and which sums were used by it to pay said notes, lug boxes rented to said corporation by plaintiff and not returned by it to him because they [52] had become broken, and money belonging to him and collected by said corporation but not paid over to him by it. The said sums owed to plaintiff by corporations were unpaid balances on open accounts receivable of plaintiff, and no open accounts payable of said corporations, and were and are debts which arose in the course of plaintiff's said business and were not contributions to the capital of the said corporations or to the capital of either of them. Each of the said corporations was completely liquidated within said taxable year and since February 15, 1945, neither of them has engaged in any business, and neither of them has had any income or assets. That prior to the liquidation of said corporations they were engaged in the business of food processing. Each of the said debts, and the whole thereof, become worthless in the said taxable year, and the loss sustained by plaintiff from the worthlessness of the said debts was incurred by him in his said business and was and is attributable to the operation of said business regularly carried on by the plaintiff.

IX.

In plaintiff's said return for the taxable year ended February 28, 1945, a deduction was taken for bad debts in the amount of \$107,567.51. This deduction was for the two debts mentioned in paragraph VIII above. At the time the return was

made the plaintiff's books showed the amount owed him by the Dehydrator Corporation was in the sum of \$73,601.49, which with the said sum of \$33,966.02 owed to him by Spencer Packing Company of Yakima make up the said amount of \$107,567.51. The said sum of \$73,601.49 represented the balance due plaintiff after applying all available credits against his account with the Spencer Dehydrators, Inc., except there was erroneously included in said balance the sum of \$223.21 which was due and owing by plaintiff during said taxable year on account of taxes on real and personal property. Said taxes, however, were against the Dehydrator plant which plaintiff was renting to said Corporation in the course of his said business. One of the said credits to Spencer Dehydrator, Inc., was for an account of Spencer Dehydrators, Inc., against the Commodity Credit Corporation, which plaintiff had taken over. Subsequent to the filing of said return and the refund claim hereinafter mentioned, an audit of the last mentioned account was made by representatives of said Commodity Credit Corporation, and it was determined by said audit that the Commodity Credit Corporation owed \$12,262.82 on said account in addition to the amount showed on the books of Spencer Dehydrators, Inc., on February 15, 1945, which was the day said account was taken over as a credit by the plaintiff. The [53] said sum was entirely earned by said Spencer Dehydrator, Inc., and it was entitled to receive said amount from the Commodity Credit Corporation prior to February 15, 1945, and is applied as a fur-

ther credit and with said taxes reduces plaintiff's said bad debt against Spencer Dehydrator, Inc., from \$73,601.49 to the sum of \$61,115.46 as specified in said paragraph VIII, and reduces his total bad debts for said taxable year from said sum of \$107,567.51 to the amount of \$95,081.48.

X.

An adjustment was made in said revenue agent's report whereby plaintiff's net income for the taxable year ended February 28, 1943, was reduced by \$25,000.00 with the following explanation:

“To allow refund of excess profits made under Sec. 3806 of Internal Revenue Code.”

It appears of record that there is now pending on appeal before the Tax Court of the United States the renegotiation question of whether or not plaintiff's net income for said taxable year includes excessive profits in said amount.

XI.

The said refund of \$687.62 received by plaintiff from the State of Oregon was not taken as a deduction in computing plaintiff's victory tax net income for the taxable year ended February 29, 1944.

XII.

The labels owned by the plaintiff and on hand at the end of the taxable year ended February 28, 1943, were then valueless, and the cost thereof in the sums shown in said revenue agent's report were charged to expense by the plaintiff.

XIII.

Plaintiff's gross income from his said business for the taxable year ended February 28, 1945, was in the sum of \$33,562.28. Plaintiff took business deductions for said taxable year in the sum of \$17,217.75 about which there is no dispute by and between the parties hereto. This amount, together with said bad debts in said sum of \$95,081.48 and taxes in said sum of \$223.21 and depreciation in said sum of \$31,617.89 give plaintiff business deductions for said taxable year in the sum of \$144,140.33. Plaintiff's net loss for said taxable year attributable to the operations of his said business was and is in the sum of \$110,578.05 (i.e. $\$33,562.28 - \$144,140.33 = (\$110,578.05)$). [54]

XIV.

During said taxable year ended February 28, 1945, plaintiff sold property which had been held by him for more than 6 months and realized a gain on account of such sales in the total sum of \$17,141.39. There are no other gains, losses or deductions to be taken into account in computing plaintiff's "net operating loss" for said taxable year in accordance with the provisions of Sec. 122 of the Internal Revenue Code. Plaintiff sustained a "net operating loss" for said taxable year, and a "net operating loss carry-back" for the taxable years ended February 28, 1943, and February 29, 1944, within the meaning of said code section in the sum of \$93,436.66, and the same was incurred in and is and was attributable to the operation of his said business regularly carried on by him.

XV.

Plaintiff inadvertently overstated his gross income for the taxable year ended February 28, 1943, by the sum of \$510.15, and his gross income for said year from the business in which he was then engaged was in the sum of \$2,275,474.85 and not \$2,275,985.00 as set forth in said return for said year. Plaintiff took business deductions for said taxable year to the extent of \$2,080,356.36 about which there is no dispute by and between the parties hereto, and which sum is less the said \$3,278.57 mentioned in paragraph VII (d) that is added back to income. Said sum of \$2,080,356.36 together with said "net operating loss carry-back" of \$93,436.66 and said depreciation in the amount of \$186.22 (paragraph VII (e)) give business deductions for said taxable year in the total amount of \$2,173,979.24. Plaintiff's net income for said taxable year from said business was in the sum of \$101,495.61. He had other income for said year in the amount of \$506.24, and other deductions totaling \$1,684.12 about which there is no dispute. Plaintiff's personal exemptions and credits for dependents for said taxable year were in the sum of \$1,900.00, and his earned income credit for said year was in the sum of \$1,400.00. His surtax net income for said taxable year was in the sum of \$98,417.73 and his normal tax net income for said year was in the sum of \$97,017.73. The total amount of plaintiff's income tax liability for said taxable year computed according to the provisions of the revenue act then in force and without regard to the provisions of the Current

Tax Payment Act of 1943 was and is in the sum of \$63,742.71, and not in the sum of \$141,722.80 as shown on his said return for said year. [55]

XVI.

Plaintiff's income tax net income for the taxable year ended February 29, 1944, was in the sum of \$68,748.98 and not \$72,272.84 as shown on said return. Said amount of \$68,748.98 takes into account the adjustments mentioned in paragraphs VII (b) and (c). Plaintiff's victory tax net income for said taxable year was in the sum of \$69,239.96 and not \$73,451.44 as shown on said return. Said amount of \$69,239.96 also takes into account the said increased depreciation set forth in paragraph VII (b). The total amount of plaintiff's combined income and victory tax liability for said taxable year computed according to the terms of the revenue act then in force but without taking into account the forgiveness features of the Current Tax Payment Act of 1943 was and is in the sum of \$40,872.39, and not in the sum of \$43,588.18 as shown on said return for said taxable year.

XVII.

That plaintiff's total income and victory tax liability for the taxable period commencing March 1, 1942, and ended February 29, 1944, computed in accordance with the forgiveness provisions of the Current Tax Payment Act of 1943 was and is in the sum of \$73,960.81 and not in the sum of \$152,619.84 as shown on said return for the taxable year ended February 29, 1944.

XVIII.

That prior to having sustained said "net operating loss carry-back" and by April 21, 1945, plaintiff paid to the defendant the total amount of \$152,619.84 on account of his combined income and victory tax liability for the taxable period ended February 29, 1944, all as more particularly set forth in paragraph V hereof. He overpaid his said income and victory tax liability for said taxable period in the sum of \$78,659.03, and defendant has not refunded the same or any part thereof to plaintiff.

XIX.

On or about April 21, 1945, plaintiff duly filed with the defendant a claim for the refund to him of the sum of \$93,565.04, which claim was based on the ground presented in the complaint herein, namely, that he is entitled to said "net operating loss carry-back," and that his income and victory taxes for the taxable period ended February 29, 1944, recomputed so as to include said "net operating loss carry-back" results in an overpayment of his income and victory taxes for said period. More than six months elapsed from the filing of said claim to the date of the filing of this action, and no notice of allowance or disallowance has been received from the Commissioner. [56]

XX.

Plaintiff made no statements or representations in any of the above-mentioned returns with an

intent to evade federal taxes. Plaintiff did not direct that any money be paid to Alice Barry with an intent to evade federal income taxes, said Alice Barry being misnamed in the answer as Alice Barry Spencer. No money received by said Alice Barry during any of the times herein mentioned represented taxable income of the plaintiff. The deficiency assessed against the plaintiff by the United States Commissioner of Internal Revenue on or about December 10, 1946, in the sum of \$12,382.35 was based on an erroneous determination by the said Commissioner that certain sums of money received by Alice Barry represented taxable income of the plaintiff.

Based on the foregoing Findings of Fact, the Court makes the following:

Conclusions of Law

I.

This Court has jurisdiction of this action and of the parties hereto.

II.

During the taxable years ended February 28, 1943, February 29, 1944, and February 28, 1945, plaintiff was engaged in a business regularly carried on by him within the meaning of Section 23, (k), (4) and Section 122, (d) (5) of the Internal Revenue Code of the United States of America.

III.

The said sums of \$61,115.46 and \$33,966.02 owed to plaintiff by said Spencer Dehydrator, Inc., and Spencer Packing Company of Yakima, respectively, were debts which became worthless within the taxable year ended February 28, 1945, and plaintiff incurred a loss in his said business during said taxable year in the total sum of \$95,081.48 from the worthlessness of said debts, all within the meaning of Section 23, (k) of the Internal Revenue Code.

IV.

Plaintiff is entitled to a business deduction for the taxable year ended February 28, 1945, in the sum of \$223.31 on account of taxes then due and owing from him on real and personal property used by him in his said business.

V.

Plaintiff has and is entitled to a "net operating loss carry-back," within the meaning of Section 122 of the Internal Revenue Code, for the taxable period beginning March 1, 1942, and ended February 29, 1944, in the sum of \$93,436.66. [57]

VI.

Pursuant to the provisions of Section 403 (e), (1) of the Sixth National Defense Appropriation Act of 1942, as amended by Section 701 of the Revenue Act of 1943 the Tax Court of the United States has exclusive jurisdiction to finally determine the amount, if any, of excessive profits received by

plaintiff during the taxable year ended February 28, 1943. In the absence of such final determination, this District Court of the United States may decide the case at bar and give judgment herein without taking into further consideration the said purported adjustment on account of alleged excessive profits.

VII.

The said refund of \$687.62 received by plaintiff from the State of Oregon should not be included in his victory tax net income for the taxable year ended February 29, 1944.

VIII.

The cost of the labels owned by plaintiff at the end of the taxable year ended February 28, 1943, were properly charged to expense by the plaintiff and should not be added back to income.

IX.

Defendant wrongfully withholds from the plaintiff the sum of \$78,659.03, and plaintiff is entitled to recover of and from the defendant the sum of \$78,659.03, together with interest thereon at the rate of 6% per annum from April 21, 1945, as provided by law, and his costs and disbursements herein incurred.

X.

Plaintiff does not owe the United States of America the said sum of \$12,382.35 or any other amount of income or victory taxes for any of the taxable

years involved in this case. The said deficiency assessed against plaintiff in the sum of \$12,382.35 was and is wrongful and invalid. Defendant is not entitled to offset any sum whatsoever against the said amount of \$78,659.03 and interest thereon due and owing to the plaintiff, and the United States of America, interpleader herein, is not entitled to recover anything from the plaintiff on account of its counter-claim herein.

Dated this 19th day of June, 1947.

CLAUDE McCOLLOCH,
Judge.

Service accepted this 19th day of June, 1947.

/s/ HENRY L. HESS,
United States District Attorney for the District
of Oregon.

True copy of the foregoing Findings of Fact and Conclusions of Law were this day duly mailed to Mr. Thomas R. Winter, Smith Tower Bldg., Seattle, Washington, with postage thereon fully prepaid.

/s/ RANDALL S. JONES.

[Endorsed]: Filed June 19, 1947. Lowell Mundorff, Clerk. [58]

In the District Court of the United States
for the District of Oregon

Civil Action No. 2949

C. B. SPENCER,

Plaintiff,

vs.

J. W. MALONEY, United States Collector of Internal Revenue for the District of Oregon,
Defendant,

UNITED STATES OF AMERICA,

Interpleader.

JUDGMENT

The above-entitled action came on regularly for trial on the 17th day of December, 1946, before the Honorable Claude McColloch, Judge of the above-entitled Court, plaintiff appearing in person and by his attorneys, Robert T. Jacob and Randall S. Jones, and defendant appearing by his attorneys, Thomas R. Winter, Special Assistant to the United States Attorney, and James P. Garland, Special Assistant to the United States Attorney General; trial was had without intervention of a jury, the jury being waived in the manner provided by Rule 38 (d) of the Rules of Civil Procedure, stipulations by and between the parties hereto with respect to certain facts were dictated into the record of this action, witnesses were sworn and testified and exhib-

its were introduced in evidence, thereafter the case was continued to February 25, 1947, at which time depositions and further exhibits were introduced in evidence by the defendant, and based upon the admissions in the pleadings, said stipulations, testimony and evidence, after due consideration, on the 19th day of June, 1947, the Court made special Findings of Fact and Conclusions of Law, which are now on file herein. [59]

Now, Therefore, on motion of the Plaintiff for judgment and based upon said Findings of Fact and Conclusions of Law:

It Is Hereby Ordered and Adjudged that the Plaintiff have and recover of and from the Defendant herein the sum of \$78,659.03 with interest thereon at the rate of 6% per annum from the 21st day of April, 1945, as provided by law, together with Plaintiff's costs and disbursements herein incurred and herein taxed in the amount of \$.

Dated this 24th day of June, 1947.

/s/ CLAUDE McCOLLOCH,
Judge.

Entered in docket June 24, 1947.

[Endorsed]: Filed June 24, 1947. [60]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: C. B. Spencer, Plaintiff named above, and Robert T. Jacob and Randall S. Jones, Attorneys for Plaintiff.

You and each of you will please take notice that the Defendant J. W. Maloney, and Interpleader, United States of America, appeal to the Circuit Court of Appeals for the Ninth Circuit, from the Judgment entered in this action on June 24, 1947.

HENRY L. HESS,
United States Attorney for
the District of Oregon.

THOMAS R. WINTER,
Special Assistant to the
United States Attorney.

/s/ VICTOR E. HARR,
Assistant United States
Attorney. [61]

[Affidavit of service by mail attached.]

[Endorsed]: Filed Sept. 19, 1947. [62]

In the District Court of the United States
for the District of Oregon

Civil No. 2949

C. B. SPENCER,

Plaintiff,

vs.

J. W. MALONEY, United States Collector of Internal Revenue for the District of Oregon,

Defendant.

ORDER

This Matter coming on to be heard ex parte this day upon motion of defendant, through his attorney, Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, for an order extending time for the filing of the record on appeal and docketing the within action in the Circuit Court of Appeals, to enable the Department of Justice to have additional time to consider said appeal, and the Court being fully advised in the premises,

It Is Ordered that the time for filing the within appeal and docketing the action be, and it is hereby extended to ninety days from the first date of the Notice of Appeal.

Made and entered at Portland, Oregon, this 17th day of October, 1947.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Oct. 17, 1947. [63]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH DEFENDANT INTENDS TO RELY ON APPEAL.

The defendant, having taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment rendered by the District Court for the District of Oregon, hereby designates the following points to be relied on in the prosecution of said appeal:

I.

That the District Court erred in finding, concluding and holding that plaintiff was entitled to a net operating loss carryback, under Section 122 of the Internal Revenue Code.

II.

That the District Court erred in finding and concluding that plaintiff was, during the taxable year, engaged in the trade or business regularly carried on by him, of financing, acquiring, owning, expanding, equipping and leasing food processing plants.

III.

That the District Court erred in finding and concluding that the sums advanced by plaintiff to or on behalf of the corporations here involved, the Spencer Dehydrators, Inc., and the Spencer Packing Company of Yakima, constituted bad debts and did not constitute capital investments by plaintiff in the aforementioned corporations.

IV.

That the District Court erred in concluding that during the taxable years ending February 28, 1943, February 29, 1944, February 28, 1945, plaintiff was engaged in a business regularly carried on by him within the meaning of Section 23 (k) (4) and Section 122 (d) (5) of the Internal Revenue Code. [64]

V.

That the District Court erred in concluding that the sums of \$61,115.46 and \$33,966.02 were owed to plaintiff by the Spencer Dehydrators, Inc., and the Spencer Packing Company of Yakima, and that such amounts were debts which became worthless within the taxable year ending February 28, 1945, and concluding that plaintiff incurred a loss in a business regularly carried on by him during said period in the total sum of \$95,081.48, from worthless debts within the meaning of Section 23 (k) of the Internal Revenue Code.

VI.

That the District Court erred in concluding that plaintiff was entitled to a net operating loss carry-back within the meaning of Section 122 of the Internal Revenue Code for the taxable period beginning March 1, 1942, and ending February 29, 1944, in the sum of \$93,436.66.

VII.

That the District Court erred in granting judgment in favor of plaintiff and against the United

States to the extent that the judgment was based on the allowance of the aforementioned net operating loss carry-back under Section 122 of the Internal Revenue Code.

Dated this 17th day of December, 1947.

/s/ HENRY L. HESS,

United States Attorney.

/s/ FLOYD D. HAMILTON,

Assistant United States

Attorney,

Attorneys for Defendant.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Dec. 17, 1947.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

To the Clerk of the Above-entitled Court:

Defendant, J. W. Maloney, United States Collector of Internal Revenue for the District of Oregon, hereby designates that portion of the record in this case to be contained in the record on appeal, which is described as follows:

1. All pleadings.
2. Transcript of proceedings of the trial.
3. Leases between plaintiff and Spencer Dehydrators, Inc., and between plaintiff and Spencer Packing Company of Yakima.

4. Findings of Fact and Conclusions of Law.
5. Judgment.
6. Notice on Appeal.
7. Order Extending Time to Docket Record on Appeal.
8. Statement of Points on which Defendant intends to Rely on Appeal.
9. This Designation.

Dated this 17th day of December, 1947.

/s/ HENRY L. HESS,
United States Attorney.

/s/ FLOYD D. HAMILTON,
Assistant United States
Attorney.

[Affidavit of service by mail attached.]

[Endorsed]: Filed December 17, 1947. [67]

[Title of District Court and Cause.]

SUPPLEMENTAL DESIGNATION OF
CONTENTS OF RECORD ON APPEAL

To the Clerk of the Above Entitled Court:

Defendant, J. W. Maloney, United States Collector of Internal Revenue for the District of Oregon, in addition to that portion of the record in this case by him designated on December 17, 1947, to be contained in the record on appeal, further designates the Order of the Circuit Court of Appeals for the Ninth Circuit, dated December 18, 1947, ex-

tending the time for filing the record on appeal in the within action for thirty days from and after December 18, 1947, to be contained in the record on appeal.

Dated this 2nd day of January, 1948.

HENRY L. HESS,
United States Attorney.

FLOYD D. HAMILTON,
Assistant United States
Attorney.

[Affidavit of service by mail attached.] [68]

[Endorsed]: Filed Jan. 2, 1948.

United States Circuit Court of Appeals
For the Ninth Circuit

No. Civ. 2949

J. W. MALONEY,

Appellant,

vs.

C. B. SPENCER,

Appellee.

ORDER

This matter coming on to be heard this date upon motion of Henry L. Hess, United States Attorney for the District of Oregon, and Floyd D. Hamilton, Assistant United States Attorney, for an Order extending time for filing of the record and docket-

ing the appeal in the within action for the reason that appellant has filed in the District Court a Designation of Contents of Record on Appeal and a Statement of Points upon which Defendant Intends to Rely on Appeal but the District Court will not be able to prepare and docket the record on appeal in the Circuit Court of Appeals within the time set therefor, and the Court having considered said motion and supporting affidavit and being advised in the premises,

It Is Ordered that the time for filing the record on appeal in the within action be, and it is hereby, extended thirty (30) days from and after December 18, 1947.

Made and entered at San Francisco, California, this 18th day of December, 1947.

FRANCIS A. GARRECHT,
Judge.

A true copy.

Attest: Dec. 18, 1947.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk.

[Endorsed]: Filed December 18, 1947. Paul P. O'Brien, Clerk.

[Endorsed]: Filed Dec. 23, 1947. Lowell Mundorff, Clerk; by F. L. Buck, Chief Deputy.

In the District Court of the United States
For the District of Oregon
Civil 2949

C. B. SPENCER,

Plaintiff,

vs.

J. W. MALONEY, Collector of Internal Revenue
for the District of Oregon,

Defendant.

United States of America,

Interpleader.

DOCKET ENTRIES

1945

Oct. 27—Filed Complaint.

Oct. 29—Issued summons—to marshal.

Oct. 30—Filed summons with marshal's return.

Nov. 9—Filed affidavit of service.

Dec. 29—Filed petition of Deft. for Extension of
Time.

1946

Jan. 5—Filed affidavit in opposition to petition
for extension of time.

Jan. 14—Record of hearing on motion for extension
of time and order entered setting for
pre-trial for Jan. 28, 1946. Fee.

Jan. 28—Filed answer.

Feb. 5—Filed motion for preliminary hearing as
to jurisdictional defense.

1946

- Feb. 11—Entered order to set motion for preliminary hearing for Feb. 25. Fee.
- Feb. 25—Record of pre-trial continued to Mar. 4. Notice mailed.
- Mar. 4—Filed and entered pre-trial order. Fee.
- Mar. 4—Entered order to submit cause on briefs and allowing to March 11, 1946 for briefs. Fee.
- Mar. 18—Filed plaintiff's brief.
- Mar. 18—Filed defendant's memorandum of jurisdiction.
- July 8—Record of opinion. Attorneys notified. Fee.
- Sept. 23—Entered order setting pre-trial conference for Oct. 28, 1946. McC.
- Sept. 23—Filed notice of appearance of Randall S. Jones as associate counsel of record for plaintiff.
- Oct. 18—Filed notice to Produce.
- Oct. 28—Filed motion to continue pre-trial conference.
- Oct. 28—Record of hearing on motion of deft. for continuance of pre-trial hearing; record of pre-trial hearing; order amending complaint by interlineation and order allowing filing of amended answer; and order setting for trial on Dec. 17, 1946. McC.
- Nov. 6—Filed motion of plaintiff for order to withdraw exhibits.

1946

- Nov. 6—Filed and entered order to withdraw exhibits. McC.
- Dec. 13—Entered order admitting James P. Garland for purposes of this case and order denying motion of deft. for continuance of trial date. McC.
- Dec. 17—Filed motion for order permitting U. S. to interplead.
- Dec. 17—Filed and entered order permitting U. S. to interplead. McC.
- Dec. 17—Filed amended answer for deft. Maloney and answer of United States. [71]
- Dec. 17—Lodged pre-trial order. (Exhibits in Box —Record Room.)
- Dec. 17—Record of trial before court and order continuing to further order (Depositions to complete). McC.
- Dec. 21—Entered order setting Jan. 27, 1947, for conclusion of trial. Notified McC.

1947

- Jan. 6—Entered order resetting for Feb. 25, 1947, for conclusion of trial. Notified McC.
- Jan. 11—Filed Transcript of Proceedings Dec. 17, 1946.
- Jan. 22—Filed Depositions of Harold G. Bauer and Alice G. Barry.
- Feb. 25—Entered record of further trial before court; briefs: plaintiff by March 31, deft. by April 1, 1947. McC.

1947

Feb. 28—Filed reply to counterclaim of the interpleader.

Mar. 3—Filed Transcript of Proceedings Feb. 25, 1947.

May 15—Entered order allowing four weeks' additional time for deft. to file brief. McC.

May 20—Filed Brief for Deft. and U. S.

May 22—Entered order for plaintiff to prepare and submit Findings of Fact and Conclusions of Law and Judgment. Notices. McC.

June 19—Filed and entered Findings of Fact and Conclusions of Law. Notices. McC.

June 24—Filed and entered Judgment for plaintiff. Notices. McC.

June 24—Filed statement of costs and disbursements claimed by plaintiff.

Sept. 3—Filed judgment roll.

Sept. 19—Filed notice of appeal—notices mailed by U. S. Attorneys.

Oct. 17—Filed and entered order extending time for 90 days from notice of appeal to file appeal.

Dec. 17—Filed designation of contents of record on appeal.

Dec. 17—Filed statement of points.

Dec. 23—Filed copy of order of C C of A extending time to January 17, 1948, to appeal.

1948

Jan. 2—Filed supplemental designation of contents of record on appeal.

United States of America,
District of Oregon—ss.

CLERK'S CERTIFICATE

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 73, inclusive, constitute the transcript of record on appeal from a judgment of said court in a cause therein numbered Civil 2949, in which C. B. Spencer is plaintiff and appellee, and J. W. Maloney, United States Collector of Internal Revenue for the District of Oregon, is defendant and appellant; that the said transcript has been prepared by me in accordance with the designation and supplemental designation of contents of the record on appeal filed by the appellant, and in accordance with the rules of this court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designations, as the same appear of record and on file in my office and in my custody.

I further certify that I have enclosed under separate cover a duplicate transcript of the testimony and proceedings dated December 17, 1946, and a duplicate transcript of the proceedings dated February 25, 1947, pages 126-146 inclusive, taken and filed in this office in this cause.

In testimony whereof I have hereunto set my

hand and affixed the seal of said court in Portland,
in said District, this 15th day of January, 1948.

[Seal]

LOWELL MUNDORFF,

Clerk.

By F. L. BUCK,

Chief Deputy.

In the District Court of the United States
for the District of Oregon

Civil No. 2949

C. B. SPENCER,

Plaintiff,

vs.

J. W. MALONEY, United States Collector of
Internal Revenue for the District of Oregon,
Defendant.

Portland, Oregon, December 17, 1946

10 A.M.

Before: Honorable Claude McColloch,
Judge.

Appearances:

Mr. Robert T. Jacob and Mr. Randall S. Jones,
Attorneys for Plaintiff.

Mr. Thomas R. Winter, Special Assistant to the
United States Attorney, and Mr. James P. Garland,
Special Assistant to the Attorney-General, Attor-
neys for Defendant.

PROCEEDINGS

Mr. Garland: If your Honor please, we find it
necessary to file a motion for the United States to

intervene in this case. There is an additional assessment which was made. We had notice of it by telegram this morning, or Saturday, rather, so, in order to put the pleadings in a condition where we can ask for an affirmative judgment in this case, we must ask that the United States be made a party for that purpose. The statute requires that a suit to recover taxes must be brought in the name of the United States, so we would like to file that motion now. If the motion is granted, we have an amended answer by the Collector—on behalf of the Collector—an answer on behalf of the United States.

The Court: We have got to have your names on these pleadings, too.

Mr. Garland: Thank you, your Honor.

The Court: You will put it on there?

Mr. Garland: Yes.

Mr. Jones: We have no objection to the filing of the motion.

The Court: It may be filed.

Mr. Winter: The motion being granted, now, we ask leave to file the amended answer.

The Court: That may be done. [2*]

Mr. Jones: If the Court please, we have no objection to filing the amended answer but, not having any advice as to exactly what it is, we would like a few minutes at least to look it over.

If the Court please, there is a counterclaim in this case. It would require a reply and we should like to reply by way of general denial to the counterclaim of the defendant United States of America.

The Court: It may be filed.

Mr. Garland: May it please the Court, I would like to make a statement in regard to this affirmative defense. I think this would be the appropriate time to do it, and it may make things easier for all of us.

The taxes assessed now are based upon the ground that Spencer diverted certain income over which he had control to the support of Alice Berry of Yakima. It will require some evidence to show a motive on his part or a desire to render that support, so we will ask now for an admission which may relieve us of the necessity of going into that question. We will ask counsel to admit, in lieu of evidence on that point, that Mr. C. B. Spencer contrived to support Alice Berry and her child and had at least a moral obligation to support them.

Mr. Jones: We are not going to make any admission at all along any lines of this counterclaim. [3]

Mr. Garland: I thought it appropriate to ask at least for an admission.

Mr. Jones: I would like to add, if the Court please, that I do not believe the rules require me to file an affirmative pleading in the nature of a reply to their further affirmative defense at the top of page 3.

Mr. Garland: If the rules do, we will waive.

Mr. Jones: I was going to say, if they do, I want to file one. I believe there is an implied denial there.

When we were having the pre-trial conference, we closed with my dictating a request into the record to produce certain books that we did not have at the time, and I have since had them numbered, together

with three statements or four statements which analyzed them, and I should like at this time to have them considered a part of the pre-trial exhibits of the plaintiff. They are numbered consecutively from Plaintiff's Pre-Trial Exhibit 65 to and including Plaintiff's Pre-Trial Exhibit 73. They are statements of our income and expenses, profit and loss statements, for the three years as taken from the books which make up the first five of the exhibits, and the last one, No. 73, is a take-off from the books of our depreciation schedule.

Mr. Garland: I understand that these are for identification only?

Mr. Jones: For identification. There is no pre-trial [4] order in this case, your Honor. The reason for that is we were not quite sure what would develop along the lines that have just developed. Before that, I had a draft of a pre-trial order which contained certain admissions that the plaintiff is willing, and continues to be willing, to make in this case. I am very glad to hand counsel a copy of it and to hand in the original draft to the Court. It has not been agreed upon, but insofar as it contains admissions on our part we are quite willing to abide by them.

The Court: Give Mr. Garland a copy.

Mr. Garland: We have it right here.

Mr. Jones: This is a case brought by Mr. Spencer, as an individual——

Mr. Winter: As part of the pre-trial, I want to identify two exhibits on our part. I advised the Court that as soon as we received exhibits we would put them in the pre-trial, your Honor.

We would like to have identified as Defendant's Pre-Trial Exhibit, first, a certified copy of the assessment list, signed by the Commissioner, and, second, a certified copy of the telegram with the certificate of the Collector showing when it was received. At the proper time, we wish to substitute photostatic copies of the returns which have been identified in the pre-trial record. We have copies of the original returns. [5]

(Documents referred to thereupon marked Defendant's Pre-Trial Exhibits 74 and 75, respectively.)

Mr. Jones: In this case, your Honor, Mr. Spencer is bringing an action based on a net operating loss or carryback, due to a net operating loss which he sustained in the year ending 1945. His fiscal year begins as of March 1st and ends February 28th and, while he makes his tax return for this particular year on the 1944 tax return form, we ordinarily refer to it as his tax for the year ended February 28, 1945.

During that year, he experienced a net operating loss which, with the adjustment which this pre-trial order takes into account, amounts to a total in the sum of \$93,436.66.

The Revenue Agent made an audit and made a report which has been identified herein as Pre-Trial Exhibit No. 63. In that, he made certain adjustments, all of which but one we admit are correct. One of those is the matter of inventory. I understand you are conceding the inventory.

If our evidence shows we are correct on the inventory item, then, the carry-back will be \$93,000 under our version of the facts in this case.

The crucial point, as I see it, will turn on whether or not we are entitled to a net operating loss carry-back in the sum of some \$93,000, as we contend, or whether we are entitled to it in the sum of some \$15,000, as the Agent's report indicates.

Now, then, the difference between the amount of \$15,000 and \$93,000 largely concerns what we claim are two bad debts and what the Agent claims are contributions to capital stock in addition to the original investment.

Mr. Spencer, at the time involved, which started with the fiscal year 1942, or ending in February, 1943, to the fiscal year ending in 1945 in February, for the last two of those years he was engaged in the business of owning, acquiring, leasing and financing of canneries and packing plants. During that time he owned and leased three plants, one of which we will refer to as the Lebanon plant, which was one he built in 1936 and operated as an individual up until March 1, 1943. The other, he acquired along the first part of the period, the dehydrator, which was an old prune drier converted into a dehydrator at Lebanon. There was a third plant at Yakima, Washington. He leased the original unit of that plant and then purchased adjoining land and built it up.

All of those plants, owned by him as an individual, were leased by him and his wife—the old Lebanon plant, the one built in 1936, to a corporation which

was organized and which went into business as of March 1, 1943, called the [7] Spencer Packing Company of Lebanon. The converted prune drier, converted into a dehydrator plant, was leased by Mr. Spencer and Mrs. Spencer to a corporation called the Spencer Dehydrators, Inc. The original leased unit and the afterwards acquired and owned unit of the Yakima plant were leased by Mr. and Mrs. Spencer to a corporation called the Spencer Packing Company of Yakima.

The reason why there are so many books and records here is that they represent the accounts of the three corporations and of Mr. Spencer. His income resulted in rents that he received from these three corporations. He drew no salary from any one of them. He was an officer and director of all of them.

In the leases which we have identified as pre-trial exhibits, there is a clause called the financing clause that required him to guarantee and to pledge his property, the property covered by the leases, in order to secure operating capital, and, in turn for that, he received the rentals. His books take into account the rentals, and also there were certain accounts between him and the corporations that resulted, at the time of the liquidation of the Yakima Corporation, in a balance due him of approximately \$78,000.

When the corporations were liquidated, he took over the assets, paid one other bill of \$30.22, and applied [8] the balance of the assets, some \$40,000, towards the \$78,000, scaling that bill down to \$33,000. That \$33,000 is one of the bad debts. That is the

\$33,000 they claim is a contribution to capital. We claim it was nothing other than what we intended to show and what the books indicate it to be and what the evidence will show that it was—a debt owed by this corporation to him—and, consequently, is a legitimate debt. The evidence will show that on and after the 15th day of February, 1945, that corporation was wholly without assets and has never had any business dealings of any kind, and, therefore, there is no intention that it will ever operate.

With respect to the other corporation in which a debt arose, there is the Spencer Dehydrators, Inc. A good deal of the financing for all of the companies and particularly the Spencer Dehydrators, Inc., was conducted through and with the American Business Credit Corporation of Portland. Due to the obligation contained in the financing clause which I mentioned, Mr. Spencer was required to personally sign all of the notes. We will show that the corporations borrowed many hundreds of thousands of dollars and that there were between 150 and 200 promissory notes, which we have here, on which he was required to sign as surety or as joint maker.

It was the understanding between himself and [9] every corporation that he signed for that he was secondarily liable. The funds, we will show, came to the corporations and were used by the corporations for corporate purposes and that as, between the two, he was to be only secondarily liable, although as to the American Business Credit Corporation he stood in the shoes of a joint maker. The Dehydrators, Inc., proved unsuccessful in its operation. During the

first year it lost \$60,000 and during the second year, it lost an additional \$13,000, making a total loss of some \$73,000 during the entire course of its life.

It only ran for two years, and he was obligated to the American Business Credit Corporation, when that liquidation took place, in the sum of about \$46,000 and, at the same time, the Lebanon Corporation, which was the old packing company, and which I am going to refer to now only as the Lebanon Corporation, had been made certain advancements by him, and he paid certain bills for Dehydrators, Inc., on an express guaranty that Mr. Spencer should guarantee all of the account which Dehydrators owed to Lebanon.

Then, there was an overdraft of some \$9,000 that Dehydrators, Inc., owed to a bank in Lebanon, which was also guaranteed by Mr. Spencer.

Then, there were some miscellaneous accounts payable by Dehydrators, Inc., which Mr. Spencer, as an individual, had guaranteed, and those accounts totaled [10] something over, I think \$100,000—I have forgotten the exact figures but, anyway, the assets of the corporation, when it went out of business, were enough to bring this account down to some \$70,000. I believe the assets were in the neighborhood of \$44,000. I have them right here, but I am just trying to outline the facts generally now. He paid those accounts as guarantor, applied the assets and he is claiming the difference as a bad debt owed to him on account of his contract of guaranty. The two amounts together add up to about \$109,000.

Since the fiscal year ended February 28, 1945, the Commodity Credit Corporation and the War Foods Administrator, made an offer on the contract that Dehydrators, Inc., had performed in its last year of operation or during its course of operation, I will say, and the income from that contract accrued was practically accruable in its last year, February, 1945. The accrued amount on the books show nothing and an auditor from Washington, D. C., came out and found that Dehydrators, Inc., was entitled to some \$12,000 more than the audit showed it was entitled to. We concede in this case, and the pre-trial order admits it, that from the total which we claim from Dehydrators, Incorporated, an additional \$12,000 should be scaled off, and we insist that our net operating loss, carry-back, is \$93,000, and we seek to carry that back to 1943. In 1943, the taxes for that year were forgiven. Any amounts paid that year will of course apply on the 1942 taxes, and, so, we seek to bring this net operating loss carry-back through 1942 to 1943 or for that fiscal year ending February 28, 1944, and have that as a deduction properly taken in the computation for tax for that year, which should result in a refund, if our theory is correct in the case, to Mr. Spencer in the sum of—again, I want to verify the figure—\$74,251.31. That, again, is considerably less than the amount put in the claim which was some \$90,000, due to this adjustment we are speaking of.

That, in brief, is the substance of our claim.

Mr. Garland: If I can be of any help to the Court here, it seems to me it would be along the lines of

testifying. In the first place, most of plaintiff's evidence is immaterial. There are no serious factual questions here involved.

The taxpayer has the burden of showing two things in order to get this carry-back. First, he has got to show that he was, in fact, in the banking business, the financial business. Then, he has to show that the so-called advance to these corporations as a guaranty, or banking arrangements that he had with them, resulted ultimately in bad debts in capital investment, because the Commisioner has determined that they were capital investments, and has allowed capital [12] deductions on that basis.

Counsel neglected to tell your Honor, I think, that Mr. Spencer organized these companies, the two here involved, I believe, the Dehydrators, Inc., and the Yakima Corporation. He was the sole stockholder. There might have been one qualifying share in the name of his son-in-law but, in any event, he was the sole stockholder and president of the company, chairman of the board of directors, and, so, they were his corporations. He formed them in 1943. They were newly formed. Then, he turned over to them certain leases and contracts which did not cost him anything—he got these growers' contracts. He turned these over to these corporations. They were going to can fruit and vegetables. They had no money to operate on, so he went to this American Business Credit Corporation, ABC, for abbreviation, and he arranged with them for financing, and of course they were not going to finance these companies that did not have any assets unless Spencer guaranteed the liability.

Now, he says that he was secondarily liable. Here he owns all the stock. An understanding between himself and the corporation is anything he cares to make it. Now, he had his stock, and everything he put into the corporations was to protect his interest in them and get them going, get them operating, to make money for himself, and for them to take the position that those were loans to the corporations, that they could not get any loans unless he personally guaranteed them is, we believe, something that cannot be supported.

So, as I say, he has got two hurdles. First, he has got to show he is in the financing or banking business. The second is that these were loans to the corporations in order to get the bad debt adjustment, and that they were not capital investments.

These matters of evidence make it look like it is conflicting, but it is not. If your Honor holds and finds that he was in the banking business and that he made actual loans to these corporations, wholly owned and formed for the purpose of taking the loans without security or assets, then, they are entitled to a considerable refund. The facts here as to the amount of income and the amount of obligations paid are not in dispute at all, or, in any event, in a very minor way, so the evidence here should be confined, it seems to me, to the things that are in dispute, so as not to unnecessarily encumber the record.

Mr. Jones: I think that is a good way to get off. I will ask for the admission of our income and expense or profit and loss sheets, evidenced by Exhibits 70, 71 and 72.

Mr. Garland: I have not had a chance to look them [14] over or examine them or to have our auditor look them over or work on them. These are reports made by them. Do these vary from the Revenue Agent's report?

Mr. Jones: If the Court please, may I bring the accountant and attorney who did the work on these up to the table, to have him sit by me during the trial?

The Court: Yes.

Mr. Garland: Do you have any disagreement with the finding of the Commissioner on the question of the obligation? Let us not call them "bad debts," and I won't ask you to call them "capital investments." Do you find any variance between your work sheets and the Revenue Agent's report?

Mr. Jones: Let me explain that. These are brief take-offs from the books of account.

Mr. Garland: I would rather have you answer my question.

Mr. Jones: I want to explain this. These are balance sheets made up from the accounts in the books. They are nothing but a summary of the books, summary taken from the books, a profit and loss statement made up from the books of account.

Mr. Brown: The figures are the same except the \$510.15.

Mr. Garland: Except \$510.15?

Mr. Brown: Yes. [15]

Mr. Garland: We are \$510 apart on this item of obligations.

Mr. Brown: That is on the net income for that year.

Mr. Garland: That is not very far. We will concede that, for the purpose of expediting the trial. The Revenue Agent's report then is satisfactory to you?

Mr. Brown: On the label adjustment, we will agree.

Mr. Garland: The label issue is simply this: I discovered that they had used the label that they started off with here. They said that they had bought them for a certain price and then wrote them off as deductible. Of course, then, I found they had used them.

Mr. Jones: I do not want to make an issue of it at this time. Then, Pre-Trial Exhibit 63 may go in as showing our income for the two years?

Mr. Garland: That is right.

(Document headed "Treasury Department, Internal Revenue Service," dated Seattle, Washington, March 7, 1946, addressed to C. B. Spencer, signed Internal Revenue Agent in charge, enclosing report of examination of income tax returns, thereupon received in evidence and marked Plaintiff's Exhibit No. 63.)

Mr. Jones: How about deductions? [16]

Mr. Garland: Will you take the same course with deductions?

Mr. Jones: Yes, except, of course, if they allow us \$15,273.36 as net operating loss carry-back, we are not conceding that that is correct, because we are claiming it is some \$92,000.

Mr. Garland: Of course, that is shown. I am not asking you to concede that.

Mr. Jones: Then, for the year 1943, the \$25,000 that you want to return to us as excessive profits that we paid less about 90 per cent of the tax on that amount,—that matter is at issue now in the Tax Court.

Mr. Garland: You want us to take those taxes, this tax?

Mr. Jones: We want to report that \$25,000 as income and pay taxes on it.

Mr. Garland: We are not trying a renegotiation case here. Anything that is done, of course, will not be binding on the Court in any case.

Mr. Jones: That goes in as income for us in this case.

Mr. Garland: No. Here is a case where they are trying to give us income.

No judgment can be finally determined in this case on that.

Mr. Jones: That \$25,000 of income brought the tax up [17] into the 90 per cent bracket, or about 95.

Mr. Garland: Any judgment in this case may be reopened to coincide with the final determination of the Board on the renegotiation proposition. That is the only proper way. We do not want to be in a position where the Government is inconsistent, collecting a tax on income while the Board is determining the renegotiation claim.

Mr. Jones: No. I don't agree with you at all. The Board has taken the position that we have earned \$25,000, the amount we are entitled to show

in the year 1943, the year ending February 28, 1943, and they want to give that back. We have already reported that \$25,000 for that year's income. On the \$25,000 we pay approximately \$22,500. There is less than \$3,000 in issue if we lose out in the Tax Court. All we have to do, if they get a judgment against us in the Tax Court to the effect that it was excessive profit, all we have to do is to give the Government a check for \$3,000, and I do not see why a matter pending in that court has a thing to do with this trial under those circumstances, when we have already reported on the 1942 return, that is, the return ending in 1943, the 1943 fiscal year, and have paid the tax on it and they have got the money, and the money is 90 per cent of the item.

Mr. Garland: We do not have the money. It has been determined here and that has been allowed. Why do you say [18] we have got the money?

Mr. Jones: We haven't got the money back.

Mr. Garland: That has been determined, and the amount you paid has been determined. In determining that, we have allowed you twenty-some thousand dollars, so he hasn't paid anything. I do not think this Court wants to make a finding, if it can avoid it, which would operate in that case because, after all, the right to negotiate cannot be tried here properly. It seems to me we ought to take what steps we can to avoid that.

Mr. Jones: Of course, the issue is this, your Honor: If they disallow it, then the Government gets the whole \$25,000. That is the issue. If it is

just normal income, ordinary income, we keep \$2250 of the \$25,000. Mr. Jacob has called my attention to this point, that that is within the exclusive jurisdiction of the Tax Court, to determine whether that is excessive profits or not. If it is, all we have to do is pay an amount that will be less than \$3,000. Of course, you say it is allowed. You have got a piece of paper here, Exhibit 63, that says we can have it back, but we don't want it back. We want it in there as ordinary income.

Mr. Garland: It has been allowed. I do not see how counsel can require the Government to endeavor to collect more taxes on it. [19]

Mr. Jones: We concede, Mr. Garland, that the adjustment that is made for the year ending February 28, 1944, that is, the \$87.62, should be added back into income for income tax purposes, but not for Victory tax purposes. It is not allowable in computing the Victory tax, and certainly should not be added——

Mr. Garland: You can concede what you like. We haven't broken that down in that detail.

Mr. Jones: It is agreed that the \$687.62 refund to Mr. Spencer, plaintiff, from the State of Oregon for State of Oregon income tax should be added into income for the fiscal year ending February 28, 1944, for the purpose of computing income but not Victory tax liability. That leaves only the year 1945, so the adjustment that I am going to next mention should apply to the taxable year ended February 28, 1945.

We concede there that the Agent's report is correct, except \$12,262.82 which we claim we were entitled to for work done by Dehydrators during taxpayer's fiscal year which ended on the date mentioned, should be added to income for that year, decreasing what we consider Dehydrators' bad debts by that amount.

Mr. Winter: Or, according to our position, increasing capital investment.

Mr. Jones: On that position, I think that would be correct. [20] The other item I am sure is in the Agent's report. We concede the amortization item. That establishes, your Honor, I believe, all the income and deductions and adjustments thereto for all the fiscal years involved in this case. Now, I would like to call Mr. Spencer as a witness. First, I want to add to that summary that I made: Except for the inventory item which is a point in controversy, the label inventory.

Mr. Winter: The label inventory adjustment.

Mr. Jones: That is right. [21]

C. B. SPENCER

the plaintiff herein, produced as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Jones:

Q. Will you state your name in full to the Reporter? A. Cecil Bond Spencer.

(Testimony of C. B. Spencer.)

Q. Your residence?

A. 835 Oak Street, Salem, Oregon.

Q. What business did you follow up until February 28, 1943? A. Canning business.

Q. How long have you been in the canning business? A. Some thirty years.

Q. During that period, did you ever build and own a cannery? A. No, sir.

Q. During that period, did you ever build and own one? A. Up to 1942, yes, sir.

Q. Where? A. In Lebanon.

Q. When was the Lebanon cannery built?

A. In 1935.

Q. Did you operate as an individual?

A. Yes, sir.

Q. From then until when?

A. From then until 1943. [22]

Q. After 1943, who operated it?

A. The Spencer Packing Company of Lebanon.

Q. The Spencer Packing Company of Lebanon, a corporation? A. Yes.

Q. Were you an officer of the Lebanon Corporation? A. Yes, sir.

Q. And a director? A. Yes, sir.

Q. Did you receive any salary from it?

A. No.

Q. I will come back to your corporation in just half a minute. I will ask you if you were an officer and director of the Spencer Packing Company of Yakima? A. Yes, sir.

(Testimony of C. B. Spencer.)

Q. And of the Spencer Dehydrators, Inc.?

A. Yes, sir.

Q. Did you receive salaries from any of those corporations?

A. No, sir.

Q. The Lebanon Corporation lease, I want to show it to you.

The Court: You don't need to show him all those leases.

Mr. Winter: We have no objection if you want to introduce 4, 5 and 6 in evidence. We have no objection.

Mr. Jones: I would like to introduce Pre-Trial Exhibits 4, 5 and 6 in evidence. [23]

Mr. Winter: No objection.

The Court: Admitted.

(Lease, dated October 5, 1943, between C. B. Spencer and Grace N. Spencer, and the Spencer Packing Company of Lebanon, was thereupon received in evidence and marked Plaintiff's Exhibit No. 4.)

(Lease, dated October 5, 1943, between C. B. Spencer and Grace N. Spencer and Spencer Packing Company of Yakima, was thereupon received in evidence and marked Plaintiff's Exhibit No. 5.)

(Lease, dated March 31, 1944, between C. B. Spencer and Grace N. Spencer and Spencer Dehydrators, Inc., was thereupon received in evidence and marked Plaintiff's Exhibit No. 6.)

(Testimony of C. B. Spencer.)

Mr. Jones: I would like to hand them to the witness, so he can testify that these are the leases covered in this action.

The Court: Well, they are. There is no issue about that.

Mr. Jones: Very well.

Q. When did you acquire that prune drier in Lebanon?

A. I believe in the fall of 1943. [24]

Q. After you got it, what did you do with it, Mr. Spencer?

A. I converted it into a dehydrator for drying of vegetables.

Q. Did you ever operate that as an individual?

A. No, sir.

Q. After it went into operation, what company operated it?

A. Spencer Dehydrators, Incorporated.

Q. Did you ever lease a cannery in Yakima?

A. Yes, sir.

Q. Did you ever operate that as an individual?

A. Yes, sir.

Q. From when until when?

A. From 1940 until 1943.

Q. While you operated that as an individual, did you acquire any adjoining lands?

A. Yes, sir.

Q. What did you do with them?

A. I built additional buildings on it.

Q. And equipped them for what?

A. Equipped them for a cannery.

(Testimony of C. B. Spencer.)

Q. After March 1, 1943, did you operate that as an individual? A. No, sir.

Q. What did you do with it?

A. I leased it as an individual, leased it to the Spencer Packing Company of Yakima, a corporation.

Q. How long did these corporations continue in business? [25] A. Until liquidated.

Q. Has the Lebanon Corporation been liquidated? A. No, it has not.

Q. Let us put it this way: How long did the Dehydrators and the Yakima Corporation continue to operate?

A. I sold the Yakima operation in 1944.

Q. What part of 1944?

A. Summer of 1944.

Q. Did you do any packing in 1944 at Yakima?

A. No, sir.

Q. The corporation packed only during the 1943 season?

A. That is right. That was the last pack.

Q. During what time did you operate the Dehydrators?

A. Two years, 1943 and 1944, I believe.

Q. I would like to have you state exactly what you did as a corporate officer and director.

A. What I did? What is your question?

Q. What your duties were as an officer and director of these corporations?

A. To arrange for the pack and the sale of it.

(Testimony of C. B. Spencer.)

Q. Did you carry on any business during the time these corporations were operating, you as an individual? A. Yes.

Q. Did you have an individual business?

A. Yes. [26]

Q. Will you explain in detail what that individual business was?

A. Why, I was acquiring property for canneries, and renting, leasing, and financing the operation of them.

Q. Who arranged for the finances for these cannery operations? A. I did.

Q. Did you do that as an individual or as a corporate officer?

A. I had to guarantee them as an individual.

Q. After you once acquired a cannery property, did you have any other duties as the owner of the cannery in keeping it up or enlarging it, anything of that kind?

A. Yes, sir, I had to enlarge them and build additional buildings, buy new equipment, and see that the plants were kept in operating condition.

Q. Can you estimate how much of your time was put into your individual business, as distinguished from that of a corporate officer?

Mr. Garland: Object to the form of the question, your Honor.

Q. (By Mr. Jones): How much time did you put in to acquire cannery properties, in acquiring cannery properties, and all the other things you

(Testimony of C. B. Spencer.)

detailed of that kind, as distinguished from what you put into your duties as a corporate officer and director? [27]

A. I would say one-third of my time.

Q. Have you any idea how many notes you guaranteed in your individual capacity for these corporations? A. Several hundred.

Q. Do you know how much the volume would run to? A. Several hundred thousand dollars.

Q. How frequently were you called upon to pursue these duties or these services that you have referred to as distinguished from your corporate duties?

Mr. Garland: Objected to, your Honor, as leading and suggestive.

The Court: He may answer.

(Question read.)

A. Weekly.

Q. (By Mr. Jones): Did it require you to do any traveling? A. Yes, sir.

Q. Will you explain that?

A. Travel from Portland to Albany, or from Lebanon to Portland, Yakima to Seattle, to Washington, D. C., New York—

Q. During this time, in enlarging these plants, did you have any occasion to have to contact Government bureaus for any purposes?

A. Yes, sir.

Q. What? [28]

A. We had to contact them for priorities, certificates of necessity and contracts.

(Testimony of C. B. Spencer.)

Q. When the Dehydrators was converted from a prune drier into a dehydrating plant, did you obtain any sort of certificate for that?

A. Yes.

Q. What was it?

A. A certificate of necessity.

Mr. Jones: I would like to introduce into evidence Plaintiff's Pre-Trial Exhibit No. 3.

Mr. Garland: I see no materiality. However, that is our only objection.

Mr. Jones: I believe that you are right, since amortization has been admitted. I will withdraw it. That is the only purpose.

Q. How many trips did you have to make back to Washington, D. C., with respect to finally getting the certificate of necessity?

Mr. Garland: Objected to as immaterial.

Mr. Jones: The burden is on me, I think, to show the basis for this, as has been stated by our own Circuit Court of Appeals. I feel like I am bound to assume the burden that they put on me to show.

Mr. Garland: Well, we have made our objection.

Mr. Jones: Very well. [29]

Mr. Winter: And also that he took the president of the corporation with him.

Mr. Jones: I move that last remark be stricken.

Q. How many times did you have to go to Washington, D. C., in order to acquire this certificate of necessity?

(Testimony of C. B. Spencer.)

A. I made several trips to Washington. I don't remember just how many were made to get this certificate of necessity, but I made—I am certain of two or more.

Q. Did you finally acquire a certificate of non-necessity? A. Yes, sir.

Q. Did that require any trip to Washington?

A. No, sir.

Q. Can you recall any other matter or duty that you performed in connection with your ownership of those plants, or any of the three of them, other than as a corporate officer or director—anything you did as owner or lessor?

Mr. Garland: Objected to as immaterial, your Honor.

The Court: He may answer.

A. Financing the operation of the plants?

Q. Yes, that you did as an owner or lessor of the plants?

A. My leases provided that I would——

Mr. Garland: The lease is the best evidence.

The Court: He may answer.

A. My leases provided that I assist in financing the operation of the plants. [30]

Q. (By Mr. Jones): How much time did you devote to the financing of the corporations and securing credit for them?

A. Quite a material part of my time.

Q. Did it necessitate any trips?

A. Yes, many.

(Testimony of C. B. Spencer.)

Q. Between where?

A. Between the plants and the banks.

Q. What was your compensation for all this work that you say you were doing, apart from being a corporate officer? A. Only my rents.

Q. Have you any idea of the volume or the value of the additions that you mentioned which you made to these properties during the time you were renting, in money?

Mr. Garland: Objected to as immaterial. It does not involve anything having to do with this case, no issue in this case.

Mr. Jones: I want to show the number of transactions and the amount of money involved and so on.

Q. Can you tell us the amount or value of the additions you made to these plants?

A. My books would show that, but over a hundred thousand dollars.

Q. Were these additions you are speaking of now made during the time you were renting them to the corporations? A. Yes, sir. [31]

Mr. Jones: I want to introduce at this time Plaintiff's Pre-Trial Exhibit No. 16. Is there any objection to that?

Mr. Garland: No objection.

The Court: Admitted.

(Bundle of warehouse receipts thereupon received in evidence and marked Plaintiff's Exhibit No. 16.)

(Testimony of C. B. Spencer.)

Mr. Winter: Do those include notes that he signed before he organized the corporations?

Mr. Jones: All the notes in Exhibit 16 are notes signed by Mr. Spencer as an individual, joint maker with one of the corporations, in order to secure finances.

Q. In converting this plant from a prune drier to a dehydrator, did you do this at the request of any Government agency? A. Yes.

Q. What one?

A. The War Food Administration.

Q. For what purpose?

A. For dehydrating vegetables for the Government.

Q. Why did you find that operation so unsuccessful?

A. Well, due to inexperienced help, several reasons—inexperienced help; continual change of specifications on the part of the Government; inexperienced inspectors—girls in most cases—and shortage of labor. [32]

Q. This help you mentioned as inexperienced, did you finally get it straightened out?

A. The longer we operated the more experienced they became.

Q. Did you ever get on a basis where you could make a profit, that company? A. Never did.

Q. The contracts that the company performed, from whom did you get those contracts?

A. From the War Food Administration.

Q. Did you ever complete any of the contracts?

A. No.

(Testimony of C. B. Spencer.)

Q. Before you closed, did you have any conversation with a War Food Administration representative? A. Yes.

Q. It was closed with their consent and approval?

A. It was closed on their recommendation, that the operation was too small.

Q. During the operation of the plant at Yakima, did it ever make money? When it was operated by the corporation, did it ever make money?

A. The books would show that.

Q. Do you recall?

A. I don't recall. I don't think it did.

Q. In two or three cases here I have referred to "your operation." Were you, as an individual, personally operating [33] the cannery?

A. No, sir.

Q. The corporations were operating them?

A. That is right.

Q. In securing lines of credit, one of them was mentioned as the ABC. Was it necessary for you to mortgage your various properties to secure those loans? A. Yes.

Mr. Jones: There is one of them here I would like to offer in evidence, Plaintiff's Pre-Trial Exhibit No. 15.

Mr. Garland: No objection. There is no question but that these are obligations given to satisfy these.

Mr. Jones: I want to put them in for another reason. Exhibits 13, 14 and 15 are copies of notes, mortgages and agreements with the ABC?

(Testimony of C. B. Spencer.)

Mr. Garland: There is no objection.

Mr. Jones: No objection to any of them?

Mr. Garland: No.

Mr. Jones: Very well.

(Copy of agreement between C. B. Spencer and wife and Spencer Dehydrators, Inc., dated November 24, 1943, thereupon received in evidence and marked Plaintiff's Exhibit No. 13.)

(Copy of agreement between American Business Credit Corporation [34] and C. B. Spencer and wife and Spencer Dehydrators, Inc., dated November 24, 1943, thereupon received in evidence and marked Plaintiff's Exhibit No. 14.)

(Copy of agreement dated February 10, 1944, between Spencer Packing Company of Yakima Spencer Packing Company of Lebanon, Spencer Dehydrators, Inc., C. B. Spencer, Grace N. Spencer, and American Business Credit Corporation, thereupon received in evidence and marked Plaintiff's Exhibit No. 15.)

Mr. Jones: The note is No. 12. I want to also include No. 12, your Honor.

Mr. Garland: No objection.

The Court: Admitted.

(Note dated Portland, Oregon, November 24, 1943, signed Spencer Dehydrators, Inc., in amount \$25,000, payable to American Business Credit Corporation, thereupon received in evidence and marked Plaintiff's Exhibit No. 12.)

(Testimony of C. B. Spencer.)

Mr. Winter: I just want to call the attention of the Court to the fact that the note is only signed by the corporation; it is not Mr. Spencer's.

Mr. Jones: No. Exhibits 12, 13 and 14 are notes, [35] mortgages and agreements for the payment of the money while No. 15 is an exhibit I am also offering—I first want to ask this question:

Q. Did you have other notes and mortgages or trust deeds for all the different plants that you made with ABC? A. Yes.

Mr. Jones: This one is a joint agreement between all the companies and Mr. Spencer. I offer it as No. 15. That has been admitted, your Honor.

The Court: Yes. Admitted.

Q. (By Mr. Jones): Did you have any understanding between yourself and the three corporations as to what your responsibility would be as between yourself and the corporations on the notes that you signed?

Mr. Winter: Object to that.

Mr. Garland: That is objected to. The notes are in evidence. They speak for themselves. Any legal liability that might arise between Spencer as an individual and the corporations would appear here, as a matter of law, from the notes.

Mr. Jones: I have a long line of cases that I can cite to the effect that oral testimony is admissible to show that as between two joint makers of a promissory note one of them is primarily and the other secondarily liable.

(Testimony of C. B. Spencer.)

The Court: I have heard that before, I believe, but [36] the fact is he is still a stockholder in these corporations.

Mr. Jones: It is a fact that Mr. Spencer owned a majority of the stock or owned all of the stock but three or four qualifying shares.

The Court: What is the purpose of your question?

Mr. Jones: The purpose of my question is to prove the surety relationship.

The Court: To go on with my question, is this in writing?

Mr. Jones: Not the agreement that I am inquiring about now; that is entirely an oral agreement.

The Court: Whom did he have it with?

Mr. Jones: He had it with the secretary of the corporation.

The Court: All right. Go ahead.

Mr. Winter: That is his son-in-law.

Mr. Jones: That is his son-in-law, yes.

The Court: Ask your question.

(Pending question read.)

A. Yes.

Mr. Garland: That is objected to, if the Court please. To allow the witness, who is in this position of sole stockholder, to give testimony as to an understanding that he had himself, as chairman of the board of directors with his son-in-law definitely opens the door to testimony that is ordinarily excluded. [37]

(Testimony of C. B. Spencer.)

The Court: You may attack its value, of course. He may answer, subject to the objection.

A. Yes.

Q. (By Mr. Jones): Will you state the substance of that understanding?

A. That I personally had to finance the operation and that I was responsible for the bills of the corporation.

Q. The question was as to these notes that you signed. As between you and the corporation, was there any understanding with respect to who would be primarily and who would be secondarily responsible? A. Yes, that was me.

Mr. Garland: We think we are entitled to have the question put in strict form, your Honor.

The Court: He may answer.

A. Yes.

Q. (By Mr. Jones): Would you state what that agreement was?

Mr. Winter: When and where was the agreement made?

The Court: Don't interrupt now. Answer the question. What was the arrangement and understanding?

Q. (By Mr. Jones): What was your understanding?

A. That I was jointly responsible with the corporation.

The Court: He wants to know if you were a surety or principal, as between you and the corporation?

A. I can't say that I understand, your Honor.

(Testimony of C. B. Spencer.)

The Court: Go ahead, Mr. Jones.

Mr. Jones: I will put it this way: Did you have any understanding between yourself and the corporation, for the corporation, whose duty it was in the first instance, to repay the money borrowed?

A. Yes, sir.

Q. Whose duty?

A. Myself, as an individual.

Mr. Garland: The question is answered.

The Court: Let him alone, now.

Q. (By Mr. Jones): I want to ask this: Did you borrow this money for your own use?

A. No, sir.

Q. What use was it borrowed for?

A. For the operation of the business.

Q. Mr. Spencer, out of what fund or out of what income were the notes to be paid?

A. Out of the operation of the business.

Q. Who was operating the business?

A. The corporation.

Q. If the corporation's income could not pay the notes, then you got stuck?

A. That's right.

Q. Was that, in substance, your understanding?

A. Yes. [39]

The Court: Are we going to have the minutes?

Mr. Jones: There are no minutes on that. That is entirely an oral understanding, your Honor.

The Court: Counsel is entitled to have you be specific. He has given you wide leeway to show it in general terms, but he is entitled to have you

(Testimony of C. B. Spencer.)

be specific as to when and where and under what circumstances that arrangement was made.

Mr. Jones: Where did you make these arrangements? A. In the office of the corporation.

Q. And with whom? A. The secretary.

Q. What is his name?

A. Bingham Powell.

Q. And when were these arrangements made?

A. They were made when we found it necessary to finance them that way.

Q. When was it?

A. It was during all the operations of the corporations.

The Court: Who was the secretary?

A. Bingham Powell.

The Court: His relationship?

Q. (By Mr. Jones): His relationship to you?

A. He happens to be my son-in-law.

The Court: Are you going to have the records showing [40] the stock ownership?

Mr. Jones: Well, I will read into the record what they are.

The Court: They are going to be in evidence?

Mr. Jones: Exhibits 59, 60 and 61 are the Articles of Incorporation and they show the subscribers. 98 shares of stock——

The Court: What company are you talking about?

Mr. Jones: This is the Spencer Packing Company of Lebanon and Mr. Spencer owns 98 shares of stock, Mr. Powell one, and C. B. Spencer, Jr., one

(Testimony of C. B. Spencer.)

The Court: How much did they pay in for the stock?

Mr. Jones: They paid in \$10,000 worth of growers' contracts.

The Court: That was the value put on the contracts?

Mr. Jones: Yes.

The Court: But what I am interested in is that he is entitled to have everything that bears on the relationship of the parties, financial and personal. Did the son-in-law have a financial interest in the company?

Mr. Jones: I am going to put him on the witness stand.

The Court: All right.

Mr. Jones: I have him here to go into that.

The Court: How many witnesses will you have?

Mr. Jones: Three, your Honor. The testimony of all [41] three of them will be substantially the same.

Mr. Garland: Are you going to put these in evidence?

Mr. Jones: Yes. I will offer these in evidence.

Mr. Winter: What are the numbers, for the purpose of the record?

Mr. Jones: 59, 60 and 61.

Q. Did you guarantee any accounts of the Dehydrators, Incorporated, to anybody?

A. Yes.

(Testimony of C. B. Spencer.)

Q. Will you state whose accounts against the Dehydrators, you guaranteed?

A. American Business Credit Corporation—practically all of those with whom we done business; Associated Oil Company——

Q. Associated or Tide Water?

A. Tide Water—Associated——

Mr. Jones: I would like to offer in evidence Plaintiff's Pre-Trial Exhibit No. 17.

Mr. Garland: No objection.

The Court: Admitted.

(Document entitled "Guarantee," dated 3/18/44, signed by Cecil B. Spencer in re guarantee to Tide Water Associated Oil Company, thereupon received in evidence and marked Plaintiff's Exhibit No. 17.) [42]

Q. (By Mr. Jones): What bank was involved?

A. The First National Bank of Lebanon.

Q. What did you guarantee there?

A. I guaranteed an overdraft.

Mr. Jones: I will offer in evidence Plaintiff's Pre-Trial Exhibits 38, 39 and 40.

Mr. Winter: The purpose primarily is to show that he paid the overdraft?

Mr. Jones: Show the overdraft and also that—also show the payment of it, yes.

Mr. Garland: We concede he paid.

Mr. Winter: No question about the amount. It is just encumbering the record unnecessarily.

(Testimony of C. B. Spencer.)

Q. (By Mr. Jones): I want to know if the bank you mentioned is The First National Bank at Lebanon, Oregon? A. Yes, sir.

Q. The overdraft that you mentioned was one between the Dehydrators and the bank?

A. And that bank, yes.

Mr. Jones: I am going to offer the exhibits mentioned; if there is no objection to the fact that he paid the overdraft, I won't bother to offer his check.

Mr. Garland: He paid the overdraft.

Mr. Jones: Very well.

(Bank records of First National Bank of Lebanon, [43] Oregon, account Spencer Dehydrators, Inc., in re overdraft, thereupon received in evidence and marked Plaintiff's Exhibits 38, 39 and 40, respectively.)

Q. (By Mr. Jones): What about the debt of the Lebanon Corporation, the amount that Dehydrators owed the Lebanon Corporation? Was there any guarantee there? A. I guaranteed that.

Q. With whom was that arrangement made?

A. The secretary of the company.

Q. And about when was it made?

A. I don't remember the date.

Q. Approximately?

A. At the start of the operation.

Q. Give the substance of it. Whom did you make it with? Whom did you take it up with?

A. With the secretary of the company, Bingham Powell.

(Testimony of C. B. Spencer.)

Q. Give the substance of the conversation?

A. That I would personally be responsible for the operation, if the operation were not in itself successful.

Q. The Lebanon Corporatioan was the older of the corporations? A. Yes, sir.

Q. Or the older plant, I should say?

A. Yes.

Q. Was there any plan by which any corporation more or less [44] acted as banker to the others?

A. Yes. The Lebanon plant—everything was handled out of the Lebanon plant. That was our main office.

Q. The idea of handling it that way—was that ever discussed with any officer of the corporation?

A. Yes, with the secretary.

Q. If the Lebanon plant was in the possession of more money at a given time than another plant, what would it do with it?

A. It would advance money to the other plants.

Q. Was that part of this same arrangement?

A. Yes.

Q. Made at the time you have been talking about? A. Yes, sir.

Q. Was there any reason that you can state why you went into this guarantee arrangement and so forth?

A. Because the banks hesitated to advance the operation without my personal guarantee.

(Testimony of C. B. Spencer.)

Q. Was there any obligation between you and the corporations?

A. Yes, upon the execution of the leases of these plants to the corporations, I agreed to assist in financing where necessary.

Q. Is that the reason for making these agreements? A. Yes.

Q. Is there any clause in the leases to that effect? A. Yes. [45]

The Court: Are you going to have Mr. Spencer's personal worth in the record?

Mr. Jones: Have what?

The Court: Are you going to have his personal financial statement in the record?

Mr. Jones: I had not planned to.

The Court: Isn't that an important background?

Mr. Jones: I will see.

The Court: You think about it.

Mr. Jones: I will see that it is in before the case is closed.

The Court: Do whatever you want to about it.

Mr. Jones: My attention is called to the fact that his personal ledger and journal for those years, Pre-Trial Exhibit No. 29, will show that, and I will offer them in evidence.

The Court: Admitted.

(Personal ledger and journal of C. B. Spencer was thereupon received in evidence and marked Plaintiff's Exhibit No. 29.)

The Court: Recess until 1:30. [46]

(Court reconvened at 2:00 o'clock p.m., December 17, 1946.)

Mr. Jones: If the Court please, I have the cashier from the bank in Lebanon whom I asked to come in last night. He drove up this morning. I only have two or three questions to ask him. I would like to call him—maybe more than two or three. I have a few questions to ask him. I would like to put him on out of order, if I may.

The Court: Yes.

J. H. IRVINE

was thereupon produced as a witness on behalf of the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Jones:

Q. Will you give your name to the Reporter?

A. J. H. Irvine.

Q. Where is your residence? A. Lebanon.

Q. What is your occupation?

A. I am cashier of The First National Bank.

Q. How long have you been employed by that bank? A. Since 1933.

Q. How long have you been cashier?

A. Since 1933. [47]

Q. Do you know Mr. Spencer? A. Yes.

Q. How long have you known Mr. Spencer?

A. I think it was in 1935 when he first came to Lebanon.

(Testimony of J. H. Irvine.)

Q. That is Mr. C. B. Spencer, sitting here in court? A. Yes.

Q. Did he have an account with your bank?

A. Yes, sir.

Q. Did the Dehydrators, Inc., have an account with your bank?

A. Spencer Dehydrators, yes.

Q. Spencer Dehydrators, Inc.? A. Yes.

Q. Did they have an account there?

A. Yes.

Q. Do you know of your own knowledge whether or not Mr. Spencer ever guaranteed that account?

A. We had a general——

Q. Answer Yes or No, please. Do you know?

A. Yes.

Q. Was it in writing or not? A. No.

Q. Why was it not in writing?

A. Our experience had been with Mr. Spencer, since he first came, that we did not feel it was necessary. We had [48] occasion to loan him money numerous times in connection with his operations and he had always met those obligations as he agreed to do.

Q. Will you state the substance of this guarantee? First, I would like to have you look at Pre-Trial Exhibit No. 38.

Mr. Garland: We have conceded the account was guaranteed and that he paid the overdraft. Is that what you had in mind? It seems it would serve no useful purpose, in view of our concession.

(Testimony of J. H. Irvine.)

Mr. Jones: All right. The account was guaranteed, is that right? A. Yes.

Mr. Jones: That is all.

Mr. Garland: No questions.

(Witness excused.) [49]

C. B. SPENCER

the plaintiff herein, having been previously duly sworn, resumed the stand and further testified as follows:

Direct Examination

(Continued)

By Mr. Jones:

I should like to put in evidence Plaintiff's Pre-Trial Exhibit No. 21, which is a certificate of non-necessity. I am not going to bother about putting in the Treasury's granting of the amortization, because you admitted the amortization, but I want this in.

Mr. Garland: No objection.

The Court: Admitted.

(Document entitled "Non-Necessity Certificate," dated May 2, 1945. War Production Board, thereupon received in evidence and marked Plaintiff's Exhibit No. 21.)

Q. (By Mr. Jones): Can you tell me, please, when the Dehydrator Corporation ceased its operations? A. I believe in February, 1945.

(Testimony of C. B. Spencer.)

Q. Along the first of the year?

A. That is right.

Q. What was the plan of liquidating these companies when you got through with them? How were you going to handle the [50] bills that they owed and so forth?

A. Use the money that was obtained by the corporation to pay the bills.

Q. By "money" you mean the accounts receivable and things of that kind?

A. That is right.

Q. Assets?

A. Yes, or any sales that could be made to liquidate the equipment and so forth, to apply on the liquidating of that indebtedness.

Q. That applied to Yakima and Dehydrators?

A. That is right.

Q. Do you know at this time of any asset or any uncompleted contract or any sum or any property of any kind owned by either Yakima or Dehydrators that has not been accounted for in your books?

A. No, sir.

Q. Will you explain the circumstances that led up to the closing of the Yakima plant?

A. It became so hard to do business. We had an extreme shortage of labor. Prices were high on the raw products. Our sales prices for the finished products were governed by OPA on an historical background which made it impossible to operate the business at a profit.

(Testimony of C. B. Spencer.)

Q. On what basis are your books kept? [51]

A. On an accrual basis.

Q. Who was in charge of keeping the books?

A. Bingham Powell.

Q. And he is your son-in-law? A. Right.

Q. Now, then, if a charge or a credit that should go into those books originated with you, what did you do about it?

A. I would discuss it with him.

Q. And it would be his duty then to do what?

A. To put it where it belonged.

Q. Are you familiar with the details of your own records or the records of these corporations?

A. No, sir.

Q. Did you pay all the balances that were owed by Dehydrators? A. Yes, sir.

Q. Now, then, the assets taken over by Yakima, how were they applied? On what bills were they applied, do you know?

A. They were applied against the bills of the Yakima Corporation.

Q. Did you have a bill against it?

A. I had a bill against it.

Q. Whatever that was, it was partially applied against that? A. Yes.

Q. The balances that show on your books—I will connect this up later with certain exhibits I am going to offer. [52]

(Testimony of C. B. Spencer.)

The balances that are true balances, as your books indicate, and which we are claiming in this case are bills—have those balances ever been paid to you, other than the application of some \$12,000?

A. No, sir.

Q. No part of it? A. No, sir.

Q. Have you in any way ever released those bills to the corporation? A. No, sir.

Q. Have the corporations been formally dissolved? Do you know the answer to that?

A. I don't know.

Q. I want to call your attention to Pre-Trial Exhibit No. 25, which I am going to offer in evidence. That is the Lebanon Corporation, the canning company. The payment of these bills is a part of the means by which another debt was paid?

Mr. Garland: A debt involved in this case?

Mr. Jones: Yes. \$53,000 owed by Dehydrators to Lebanon Corporation was charged to Mr. Spencer and it went into his general account between him and Lebanon and, when he was balancing off his account with Lebanon, he took over and personally paid these bills, so, no matter how you apply the payments, everything in it was paid? [53]

Mr. Garland: No objection.

Mr. Jones: I am offering in evidence Plaintiff's Pre-Trial Exhibit No. 25.

The Court: Admitted.

(Group of notes executed by Spencer Packing Company of Lebanon, marked "Paid,"

(Testimony of C. B. Spencer.)

thereupon received in evidence and marked Plaintiff's Exhibit No. 25.)

Mr. Jones: I think the witness should see these.

(Plaintiff's Exhibit No. 25 handed to the witness.)

A. These have been paid.

Q. They have been paid? A. Yes, sir.

Q. By you, personally? A. Yes, sir.

Q. Do you know of any credit of any kind due either Dehydrators, Incorporated, or Yakima Corporation that have not been entered into your books and given to you? A. I know of none.

Q. The capital stock of these corporations, as shown by exhibits in evidence, were growers' accounts, and I want to call your attention to Plaintiff's Pre-Trial Exhibit No. 62.

Mr. Winter: You don't mean capital stock. That was [54] turned in by Spencer personally, not by any of the other incorporators.

Mr. Jones: Mr. Spencer turned in all of them, that is right.

Mr. Winter: The other incorporators did not turn them in?

Mr. Jones: No.

Mr. Garland: What is the purpose of that?

Mr. Jones: Just to show the form that the growers' accounts were made out in. I am going to ask about it.

Q. Plaintiff's Pre-Trial Exhibit No. 62, can you see it from there? A. Yes.

(Testimony of C. B. Spencer.)

Q. Do you know what it is?

A. Standard fruit and vegetable contract.

Q. Is that the form on which all growers' contracts which were issued in payment of the capital stock of all three corporations were made out on?

A. Yes, sir.

Q. The capital stock of the Lebanon Corporation you stated as \$10,000, according to the minutes here in evidence. Do you know what the value of the growers' contracts were that were turned in for that stock?

Mr. Winter: Objected to as incompetent, irrelevant and immaterial. There might be some materiality if there is any [55] testimony as to the cost, but whatever this witness may have considered as the cost is immaterial.

The Court: Answer yes or no. Do you know the value? A. Yes, sir.

Q. (By Mr. Jones): Go ahead and tell what the value was. A. The value——

Mr. Winter: Object to that. Did your Honor rule?

The Court: Go ahead.

A. The value is usually considered \$5 a ton buying charge.

Q. (By Mr. Jones): How are those contracts acquired?

A. By going out and contacting the various growers and signing contracts with them.

Q. Have you any independent recollection at this time of approximately how many of them were turned over to the Lebanon Corporation? I will

(Testimony of C. B. Spencer.)

see if this recites it. If it does, it is probably the best evidence. It says 600 of these contracts were turned over for the capital stock of Lebanon. Were those 600 contracts acquired in the manner you have just stated? A. Yes.

Q. Could a new corporation or a new cannery go into business without them?

A. Absolutely not.

Q. Why?

A. They must have the raw products on which to work. [56]

Q. What does that do?

A. That furnishes them with a supply.

Q. Do you know what the value of these would have been to the Lebanon Corporation at the time they were turned over to it for its stock?

Mr. Garland: The Lebanon Corporation is only indirectly, if at all, connected. You are talking about the Lebanon now?

Mr. Jones: That is right.

Mr. Garland: What difference does it make?

Mr. Jones: I will take it up as to the other corporations. I was going to do it with all three. I think you are probably technically right on that point.

On the Yakima Corporation, we will see if it states how many there were. It says there were approximately 600 there.

Do you know what the value of the 600 growers' contracts to the Yakima Corporation would have been at the time they were turned over to it?

(Testimony of C. B. Spencer.)

A. They would have been in considerable excess of \$10,000.

Mr. Winter: All of them say approximately 600?

Mr. Jones: No, I don't think the other one says anything. The Dehydrators, Inc., says "a number of contracts."

Q. Do you have any independent recollection at this time of the contracts that were turned over to Dehydrators in exchange for its capital stock of \$5,000? [57]

A. Processed three different vegetables, beets, carrots and potatoes, and there were, I should judge, in all, some 50 to 100 different contracts.

Q. Do you have any idea what the value of those contracts was to the corporation at the time you turned them over?

A. In excess of the \$5,000.

Q. How long did these contracts run by their terms?

A. They ran for that current season.

Q. Do they have any value after the season is over?

A. No, sir.

Q. There has been some statement here about inventories of labels in connection with the operation that you ran as an individual in 1942; you ended that year, February 28, 1943, with some label inventory. Do you know the details of what happened to those inventories?

A. Those inventories were written off.

(Testimony of C. B. Spencer.)

Q. And, then, were they subsequently used?

A. They were, due to the extreme shortage of paper, and we had been unable to get labels. We have in every way attempted to use those labels by reprinting, blocking out and otherwise making them as presentable as possible to use.

Mr. Garland: We submit he is not answering the question. I submit his answer is not responsive.

Q. (By Mr. Jones): Have you used all of them yet? [58]

A. Nowhere near all of them.

Q. Those that you have used, did you have them reprinted as you have said?

A. Yes.

Q. At an extra cost and expense to yourself?

A. As much as the original cost.

Q. At the end of the year, on February 28, 1943, were they considered of any value to you?

A. No, sir. I might qualify that a little further. A great many of the sizes that we were using were outlawed by the Government restriction of canning sizes, and they are still.

Q. Did you ever at any time contribute or intend to contribute any capital to any of these corporations, other than the growers' contracts?

A. No, sir.

Mr. Jones: I should like at this time to introduce in evidence Plaintiff's Pre-Trial Exhibits 26, 27 and 28, for the years ending 1943, 1944 and 1945. They are the tax returns I asked from you.

Mr. Garland: We will have them for you here. Just offer them.

(Testimony of C. B. Spencer.)

Mr. Jones: I offer those in evidence, and also would like at this time to offer in evidence the claim of which you have a photostatic copy.

Mr. Garland: We will produce it. That will be substituted [59] for Pre-Trial Exhibit No. 1.

Mr. Jones: We will have it marked.

Mr. Garland: No objection.

(Photostatic copy of claim for refund of \$93,565.04, Federal Income Tax for the Fiscal Year Ended February 28, 1943, thereupon received in evidence and marked Plaintiff's Exhibit No. 1.)

(Certified copy of Amended Individual Income Tax Return, February 28, 1943, filed by C. B. Spencer, thereupon received in evidence and marked Plaintiff's Exhibit No. 26.)

(Certified copy of Individual Income Tax Return, February 29, 1944, filed by C. B. Spencer and Grace N. Spencer, thereupon received in evidence and marked Plaintiff's Exhibit No. 27.)

(Certified copy of Individual Income Tax Return, April 25, 1945. C. B. Spencer, thereupon received in evidence and marked Plaintiff's Exhibit No. 28.)

Mr. Jones: There are some tax returns for prior years that I want to refer to and I believe those are the ones that you said at the pre-trial that you had no objection [60] to presenting.

(Testimony of C. B. Spencer.)

Mr. Winter: I said I would secure them. What returns do you want?

Mr. Jones: From 1937 to and including 1941.

Mr. Winter: 1937, 1938 and 1939, C. B. Spencer?

Mr. Jones: And 1940 and 1941.

Mr. Winter: I have got 1937 through 1940, inclusive.

Mr. Jones: Have you got 1941?

Mr. Winter: No, we do not have it.

Mr. Jones: May I go ahead and put in 1941, the one that is missing, in evidence?

Mr. Garland: We would like to make inquiry of the purpose of these earlier returns. What is the purpose of putting those in?

Mr. Jones: Well, we want to show his income in past years in connection with the argument in the case.

Mr. Garland: Objected to on the ground it is incompetent, irrelevant and immaterial. I don't know what argument he is going to make, but we cannot see how going back four, five or six or eight years has anything to do with any issue here at all.

Mr. Jones: This may be a little premature at this time, that part of the case, but it also does show inconsistent treatment of inventory and for that reason I think it is admissible in the case, your Honor. [61]

Mr. Winter: I do not understand we have any question of inventories in this case.

Mr. Jones: The label inventory.

(Testimony of C. B. Spencer.)

Mr. Winter: Certainly, these returns do not go to this label inventory.

Mr. Jones: If we show we treated it consistently, year after year, charging labels to expense——

Mr. Garland: We will agree they were charged to expense. There is no use cluttering up the record.

Mr. Jones: All right. I want that later in connection with your case in chief. You may cross-examine.

Cross-Examination

By Mr. Garland:

Q. What is your full name?

A. Cecil Bond Spencer.

Q. Mr. Spencer, when did it occur to you to look upon yourself as a financier of corporations? When did it cross your mind that you were in that business? A. In 1943.

Q. When did you first show your business as that of financing corporations on your income tax returns?

Mr. Jones: I think that is irrelevant.

Mr. Garland: All right.

A. I would have to leave that to my tax attorney.

Q. (By Mr. Garland): When were you first advised to make [62] them out that way, to show that you were in the business of financing corporations? A. Well——

Mr. Jones: There is no evidence that he has been advised.

(Testimony of C. B. Spencer.)

Mr. Garland: This is cross-examination, if the Court please. I can lead him on cross-examination, I believe, and cross-examine him generally on the proposition here presented and the issues.

(Pending question read.)

A. Those matters were handled by my tax attorney.

Q. (By Mr. Garland): Did you ever show on your return that you were in the business of financing corporations?

A. I would have to leave that to my attorney to answer.

Q. In other words, if it was proper to make that declaration, you left it to your tax accountants to put it in, is that right? Is that right?

A. I left those matters all to my tax attorney.

Q. I show you your income tax return for the fiscal year ended February 29, 1944, and call your attention particularly to Schedule C-2, and ask you to read what it shows there concerning the nature of your business.

A. Where do you find that?

Q. Schedule C-2. What do you show as your business?

A. Business name "Spencer Packing Company." [63]

Q. What do you show with regard to the nature of your business, if anything?

A. There is nothing that is to indicate it.

(Testimony of C. B. Spencer.)

Q. There is an indication there that something has been erased. Do you have any recollection concerning that? A. No, sir.

Q. Is there an indication it has been erased?

A. I couldn't state.

Q. You are looking at the paper which has been erased. Do you know anything about that?

A. No, sir.

Q. I will show you your income tax return for the next fiscal year, the fiscal year ended February 28, 1945. There, you are stating your occupation for the first time. What do you show there?

A. Food processing plant, rentals, operation and financing.

Q. That is the year of these carry-back leases, isn't it, 1945? That is the leases you want to carry back? A. That is right.

Q. Did your tax counsel tell you at that time in order to carry it back and in order to be in a position to make that argument, you would have to put that in there?

A. I had nothing to do with it, sir.

Q. What companies have you assisted in their financial structure, or their financing, in which you did not own stock? [64]

A. Would you state that again?

(Pending question read.)

A. None.

Q. Then, you have never financed any corporation that you did not own all of the stock except qualifying shares? A. For this purpose, yes.

(Testimony of C. B. Spencer.)

Q. What is your answer? Is your answer qualified? A. No.

Q. What was your answer?

A. I have not financed any other operations.

Q. You owned all the stock except a qualifying share in your son-in-law in both the Dehydrators, Incorporated, and the Yakima Canning Company, is that right? A. No, that is not correct.

Q. Who owned the stock, first, of Dehydrators, Incorporated?

A. The Dehydrators' stock was owned by myself, Bingham Powell and C. B. Spencer, Jr.

Q. How many shares of the stock of the Dehydrators, Incorporated, did you have in the beginning and throughout all times until its liquidation? How many shares did you have in that corporation?

A. I had, I think, all of them but two.

Q. All of them but two? A. Yes.

Q. The two you did not have were in the names of your [65] son-in-law and your son?

A. Yes.

Q. They were qualifying shares in order to enable them to be directors, is that right?

A. That is right.

Q. The same applies to the Yakima Corporation? A. No, sir.

Q. Tell us about that one.

A. I owned the majority of the stock in the Yakima Corporation.

Q. How many shares did you own?

A. Probably 98.

(Testimony of C. B. Spencer.)

Q. Who owned the other two?

A. Fred Briggs and Fred Tesch.

Q. How many shares each did they have?

A. And Bingham Powell, three. They had a share apiece.

Q. How many shares outstanding, 100?

A. 100 shares.

Q. You owned 97 shares? A. Yes.

Q. And they owned one apiece for qualifying shares? A. I believe that is correct.

Q. You were President of Dehydrators, Incorporated? A. Yes, sir.

Q. Your son-in-law was the secretary? [66]

A. Secretary-Treasurer.

Q. What other officers did you have?

A. Vice-President.

Q. Who was that? A. My son.

Q. Who was vice-president? A. My son.

Q. How old was he then, in 1943?

A. Oh, in '43 and '18—he would be about twenty-five.

Q. So, the officers of Dehydrators, Incorporated, were comprised of yourself, your son and your son-in-law? A. Correct.

Q. Who were the directors? A. The same.

Q. You were the chairman of the directors?

A. I was president.

Q. Who were the officers in the Yakima plant?

A. I was president, Bingham Powell was—I believe the records will show.

(Testimony of C. B. Spencer.)

Q. You know who they were.

A. That has been several years ago. I think you had better rely on the records.

Q. Don't you know who the officers of the Yakima Corporation were?

A. I know who the officers were, yes. [67]

Q. Who were they?

A. They were Fred Briggs, Fred Tesch, Bingham Powell and myself.

Q. Who were the directors

A. The same.

Q. And you were the president? A. Yes.

Q. You testified, Mr. Spencer, that you spent approximately a third of your time on business which was not connected with the management of your canneries and dehydrator plant?

A. That's right.

Q. You mean that was not connected with the canneries and the dehydrator plant or connected with the management thereof. What financing did you do in that third of your time that you served during this period as an officer and director of those companies? What did you do?

A. What did I do?

Q. Yes.

A. Well, I arranged financing for the operations.

Q. Isn't that what the president and vice-president and 100 per cent stockholder, so to speak, would do in any corporation that needed financing?

A. That is what they might attempt to do.

(Testimony of C. B. Spencer.)

Q. Would their efforts be directed in that course, to that end, if the corporation needed financial help? [68] A. Correct.

Q. How do you say then, Mr. Spencer, that on the one hand your efforts were directed to an enterprise unassociated with your presence and your management of those canneries, in the direction of financing the companies? Explain how that could be.

A. That was part of the provisions in the leases of these plants to the corporations.

Q. You mean, in the leases you agreed and guaranteed the obligations?

A. No, sir, I agreed to assist in financing.

Q. What was done after the companies were set up? What did you do in that direction, other than merely drawing on the bank, on the ABC?

A. I will answer that in this way: We could not get finances to operate the corporations and, in order to obtain finances, I had to mortgage my personal property in order to secure them.

Q. You owned the corporations, didn't you? You owned all the stock?

A. That is a different identity.

Q. Was it your duty to finance them in order to protect your stock?

A. That was a different person; that was a corporation.

Q. But you owned the stock in the corporations? [69] A. Yes.

(Testimony of C. B. Spencer.)

Q. And you wanted the corporations to be a success so that you would enjoy that success as a stockholder, isn't that true? A. Correct.

Q. And, in order to do that, you had to arrange financing for them? A. Not as a stockholder.

Q. They could not have operated if you had not raised finances for them, could they?

A. That is right.

Q. Your stock would have been worthless?

A. Yes.

Q. So, you did it to protect your stock?

A. That was a part of the provisions of the lease, that I was to do that as an individual.

Q. A part of the provisions of the lease?

A. That is true.

Q. You wanted this company to be a success. You were the sole stockholder? A. No, sir.

Q. You did not want it to be a success?

A. I wanted it to be a success, but I was not the sole stockholder, sir.

Q. You say you were not the sole stockholder?

A. That is right.

Q. That is a question. What you did was to expand your credit and invest that money to make the enterprise work, isn't that so?

A. That is correct.

Q. You wanted it to work because it would be money in your pocket if it did work, isn't that so?

A. That is right.

(Testimony of C. B. Spencer.)

Q. If it did not work, they could not pay you the lease money and you would get no other return from the corporation, isn't that so?

A. That is correct.

Q. And, in order for all that to happen, it had to be financed? A. That is right.

Q. So, you arranged for that to take place?

A. I agreed to do that in the lease, when I leased it.

Q. You did that for that purpose?

A. I agreed to do that when I leased the properties to the operating companies.

Q. What was the term of the lease? When did it expire? Did it have any expiration date, do you know? A. I don't remember.

Q. So, you finally decided that it was not a profitable enterprise, either from your standpoint as a stockholder [71] or receiving rentals, isn't that so? A. Yes.

Q. So, when that happened, you closed up?

A. I sold out.

Q. What was your net worth on March 1, 1943, do you know?

A. I don't know. You will have to ask my accountants.

Q. Were you in a financial position to operate these canneries independent of the corporations, or to finance the corporations yourself?

A. The records will indicate that.

Q. Can't you answer that question?

A. Apparently so. All corporations were operating.

(Testimony of C. B. Spencer.)

Q. But they were operating on an agreement with the banker, were they not, which you guaranteed? A. Yes.

Q. You had not the money to operate them independent of the banker? A. No.

Q. You were not in a position to finance these companies, is that right?

A. Not independently, sir. I don't know of anyone who is.

Q. When you organized these companies, you knew you had to raise money for them one way or another in order that they might even get started?

A. I knew money must be secured to operate them. [72]

Q. So, you extended your credit for that purpose?

A. That was the arrangement at the time. It was not necessary if the corporations could secure it otherwise.

Q. How could they secure it otherwise?

A. Well, if the banks would advance the corporations the money.

Q. Didn't the corporations have independent credit enough to go to a bank to get money to start operating? A. That has been done.

Q. Could it have been done in these cases, in connection with these corporations?

A. It was not done in this case, no.

Q. Could it have been done?

A. It was not possible. We exhausted every source.

(Testimony of C. B. Spencer.)

Q. They did not have assets for that purpose when they were incorporated?

A. That is right.

Q. So the only way in the world they could get started was for you to assist them in the financing of it?

A. It so appears.

Q. That is right. You knew that when you organized them, didn't you?

A. No, sir.

Q. Do you mean to say that when you organized these corporations you thought the corporations could go out and get credit [73] on their own?

A. Yes.

Q. You thought that?

A. Yes.

Q. Why was there any occasion for you to guarantee their accounts?

A. Simply as a guarantee that I would assist them.

Q. What reason did you have to think the bank would loan you enough money to get started in these canneries on these growers' contracts?

A. I don't believe that is—how did I start the original business?

Q. I am sure I don't know.

A. This is the same deal.

Q. What do you mean, the same deal?

A. I started the original plant in Lebanon on the same basis.

Q. What basis?

A. No financing.

(Testimony of C. B. Spencer.)

Q. No financing? My question was: Did you expect these corporations to finance themselves on the strength of these growers' contracts? That is all they had when they started?

A. That is right.

Q. You knew you had to finance them?

A. I was not positive, no. I built up one business on that [74] basis.

Q. When the Yakima Corporation liquidated in 1945, all the obligations there were yours, were they not? All the obligations of the company were held by you, is that so? A. No, that wasn't so.

Q. Well, who held them?

A. Various creditors.

Q. To what extent? Who is one of them?

A. I was.

Q. To what extent?

A. Oh, the books will indicate.

Q. Do you recall? A. I do not.

Q. Isn't it correct that you paid \$78,864.74 of the obligations yourself?

A. That is probably so. The books will tell that. I don't remember those figures, though, sir.

Mr. Garland: Give him the books. Let him testify from it.

A. I am not familiar with the books, sir.

Q. Would you say that figure is approximate?

A. I believe that is the figure.

(Testimony of C. B. Spencer.)

Q. There were miscellaneous headings in your books called "Miscellaneous Accounts" that you held, \$30.22. Do you intend to leave the impression here with the Court that you [75] did not hold these obligations of the Yakima Company when it was obligated? You had reference to the \$30.22, is that right? A. Apparently so.

Q. You apparently did. That was the Yakima Corporation we were talking about. What about the Dehydrators, Incorporated? When they liquidated, is it true you held \$45,635.41 of the obligations? A. The books will indicate that.

Q. Would you say that is approximately correct?

A. If that is on the report, that is true.

Q. American Business Credit held \$46,567.17 and Miscellaneous \$4,786.73, so all except \$30.22 of the obligations of the Yakima Corporation were yours? You held them? Most of that was accrued rental, was it not, unpaid rent?

A. I assume that is correct.

Q. As to the obligations of Dehydrators, Incorporated, in that period, that was mostly unpaid rent, is that right?

A. I would not say that is true, no.

Q. Do you know anything to the contrary?

A. I think a good share of it was lost in the operation.

Q. Is that reflected in the ABC account?

A. I wouldn't know. That is handled by my accountants.

(Testimony of C. B. Spencer.)

Q. In other words, you had two corporations, you knew that, that liquidated their obligations, most of which were yours. [76] You not only owned all the stock; you were manager and president and director; yet, you say you loaned money to these corporations and you are not in the canning business—you are in the financing business, is that what you say? A. That is right.

Q. You made that contention for tax purposes for the first time when it became an advantage to do so, that is right, isn't it?

A. I left that to my tax accountants.

Q. Do you know Alice Berry?

Mr. Jones: If the Court please, that is objected to.

The Court: That question is proper.

Q. (By Mr. Garland): Do you know Alice Berry, also known as Alice Berry Spencer?

A. I claim immunity against self-incrimination.

Q. Would it be incriminating to know her?

Mr. Garland: If your Honor please, I think we are entitled to have that answered.

The Court: No use going any further. He is granted the privilege.

Q. (By Mr. Garland): Do you know Harold G. Bauer? A. Yes, sir.

Q. Did you get him started in business?

A. I assisted him.

Q. Is he still your selling agent? [77]

A. No, sir.

(Testimony of C. B. Spencer.)

Q. At any time, was he your selling agent?

A. He was.

Q. Didn't he handle substantially all the produce and sales——

Mr. Jones: At this point, may the witness be considered a witness for the Government?

Mr. Garland: Yes, we will consider **him our** witness, if the Court please, under Rule 43(b), Rules of Civil Procedure, which gives the power to cross-examine him, since he is a part to this litigation. If we are out of order and your Honor would rather wait until after the plaintiff rests, we would be glad to do that, your Honor.

Mr. Jones: I don't care what order you take.

Mr. Garland: Are you familiar with that rule?

Mr. Jones: Yes, but he is your witness; that is all.

Mr. Garland: Under that rule, yes.

Q. You paid him commissions for the sale of your canned goods? A. Correct.

Q. During all the period here involved. When did you start?

A. When did we begin with Harold Bauer, you mean?

Q. That is right.

A. We started doing business in 1941. [78]

Q. And you continued until now? You have continued until now? A. Yes, sir.

Q. Do you have that arrangement at present? That arrangement is current? A. Yes, sir.

(Testimony of C. B. Spencer.)

Q. Do you have any idea of the commissions you paid or your company paid Mr. Bauer during your fiscal year 1943?

A. Five per cent of sales.

Q. Five per cent on all sales?

A. Yes. What year did you state?

Q. What is that?

A. What year did you state?

Q. Well, your fiscal year 1943?

A. That is right.

Q. The same thing in 1944?

A. That is right.

Q. And 1945?

A. 1941—what I was getting at, in 1941 he did not handle the entire sales.

Q. He started handling the entire sales in 1942, is that right? A. That is right.

Q. And since then, and through 1945, he handled the entire sales? [79]

A. In a satisfactory manner, yes.

Q. Do your records here reflect the amount of commissions paid to Mr. Bauer?

A. I believe they will show the amount of brokerage paid.

Q. Do you know the amount of commissions during that time? A. No, sir.

Q. Have you any idea? A. No, sir.

Q. How did you happen to select Mr. Bauer to handle your accounts?

(Testimony of C. B. Spencer.)

A. Because I thought he was a bright, capable young man and his past performance in working for other people demonstrated to me he would be a good man to work on his own.

Q. Is it not true that you required him to turn over a certain amount, namely 10 per cent of the amount of his commissions, received from the sale of products you manufactured to Alice Berry Spencer?

A. I had nothing to do with it, sir. I had nothing to do with the operation of his business.

Q. Isn't it true that you made known to him that was a necessary requisite for him to get your business? Isn't that true?

A. Yes, that was the agreement with him, when he formed this company, this sales organization, that he would give [80] her a substantial interest in the business.

Q. Why did he do that, do you know?

A. In order for him to start in business.

Q. In order for him to get your account, isn't that right? A. That is right.

Q. Why were you interested in Alice Berry Spencer receiving that amount of money?

The Court: Don't ask any more of those questions. The man is entitled to privilege.

Mr. Garland: If the Court please, we have got to prove this case.

The Court: You can't prove it by him.

(Testimony of C. B. Spencer.)

Mr. Garland: We cannot prove it by him, that is true. However, I want some advice as to how far your Honor's ruling goes. Do I understand we are not to question him——

The Court: You cannot convict any man under American and English law on his own testimony, or anything that is degrading to him, or that bears on the commission of a crime. You know that and Mr. Winter knows it. There is no need to play around with that question. I won't have it. You have got to prove your point some other way.

Mr. Garland: I am merely endeavoring to ascertain how far the ruling went.

The Court: It is self-evident that it goes to anything that leads to that point. [81]

Mr. Garland: That is all.

Mr. Jones: There is one thing before the witness leaves the stand, that of putting into evidence these contracts that refer to the ABC. I am offering them in evidence.

Mr. Winter: What are the numbers on them?

The Court: Step down.

Mr. Garland: May I make this observation? We make no objection to 8, 9 and 10, except the way in which they are designated here as "Accounts Receivable." We want it understood we will not be affected by the designation.

Mr. Jones: No.

Mr. Garland: There is no significance in the way they are designated?

Mr. Jones: No, not at all.

(Testimony of C. B. Spencer.)

The Court: Admitted.

Mr. Jones: We would like to have No. 7 included.

(Copy of contract dated October 4, 1943, between Spencer Packing Company of Lebanon and American Business Credit Corporation thereupon received in evidence and marked Plaintiff's Exhibit No. 7.)

(Copy of contract dated October 4, 1943, between Spencer Packing Company of [82] Lebanon and American Business Credit Corporation, thereupon received in evidence and marked Plaintiff's Exhibit No. 8.)

(Copy of contract dated November 23, 1943, between Spencer Dehydrators, Inc., and American Business Credit Corporation, thereupon received in evidence and marked Plaintiff's Exhibit No. 9.)

(Copy of contract dated February 10, 1944, between Spencer Packing Company of Yakima and American Business Credit Corporation, thereupon received in evidence and marked Plaintiff's Exhibit No. 10.)

Mr. Jones: And we also offer Plaintiff's Pre-Trial Exhibit No. 11, contract between Spencer Packing Company of Yakima and the ABC.

The Court: Admitted.

(Copy of contract dated February 10, 1944, between Spencer Packing Company of Yakima

and American Business Credit Corporation, thereupon received in evidence and marked Plaintiff's Exhibit No. 11.) [83]

FREDERICK JOHNSON

was thereupon produced as a witness on behalf of the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Jones:

Q. State your full name for the record.

A. Frederick Johnson.

Q. What is your business?

A. I am an accountant.

Q. CPA? A. Yes.

Q. Where did you go to school to study that?

A. I graduated from the University of Oregon.

Q. Are you a member of a state board or association of CPA's?

A. I am a member of the Oregon State Society of Certified Accountants and an associate member of the American Institute of Accountants.

Q. How long have you been engaged in the business—first, before that, what was the nature of your work or what is the nature of your work as a CPA?

A. I examine and analyze accounts, accounting records.

(Testimony of Frederick Johnson.)

Q. For whom are you employed at this time?

A. Mr. Robert T. Jacob.

Q. How long have you been employed by him?

A. Approximately two and a half years.

Q. For whom have you worked other than for Mr. Jacob?

Mr. Garland: Objected to as incompetent.

A. I worked for the Federal Government prior to that and with Price, Waterhouse & Company for eleven years prior to that.

Q. (By Mr. Jones): Did you make an examination of the books, vouchers and records of the Spencer Packing Company of Lebanon?

A. Yes.

Q. For the fiscal years ending February 28, 1943, February 28, 1944, and February 28, 1945?

A. Yes.

Q. And for the same period, did you examine such records and books of the Spencer Packing Company of Yakima?

A. I did.

Q. And Spencer Dehydrators, Inc.?

A. Yes.

Q. And the personal accounts of Mr. C. B. Spencer?

A. Yes.

Q. Some of which are prior to this time under the name of C. B. Spencer, doing business as the Spencer Packing Company?

A. That is correct.

Mr. Winter: May I inquire the nature of Mr. Johnson's testimony? Is it with respect to accounting issues?

(Testimony of Frederick Johnson.)

Mr. Jones: I am qualifying him to show that he inspected [85] the books and records and that they are summarized by the statement taken from the books.

Mr. Garland: Let us see your statement. Maybe we can agree on it.

Mr. Jones: I will give you a copy out of my file.

Mr. Garland: Have it identified. It will not take any longer than to have my man look it over.

Mr. Jones: I am going to hand this witness Pre-Trial Exhibits 35 and 36, 44, 48, 50, 53, 56 and 58.

Mr. Garland: We would like to say, your Honor, that these are statements prepared by this accountant. We want to expedite this file, but we cannot agree to these, particularly No. 58, summary of C. B. Spencer's bad debt account, Dehydrators, Inc., and Yakima Corporation. If that is typical of what they contend, we would like to scrutinize them carefully.

Mr. Jones: Wait until I finish with the witness, please. Mr. Bailiff, will you hand these exhibits that I have mentioned to the witness?

(Documents handed to the witness.)

Q. (By Mr. Jones): Did you prepare those?

A. Yes, sir.

Q. Will you state where you got the information for their preparation?

A. From the books and records, and supporting data of Spencer Dehydrators, Inc., the Spencer

(Testimony of Frederick Johnson.)

Packing Company of [86] Yakima, C. B. Spencer and, to a certain extent, from the records of the Spencer Packing Company of Lebanon.

Q. I would like you to look at this pile of books on the table here and see if these are the records to which you refer. You will have to look at the numbers on them. Maybe you had better step down to the table and look at them. The records you are looking at are Pre-Trial Exhibits 29, 30, 31, 32 and 33. You may resume the witness stand.

A. I used those books there, but it is possible some of these other records on the table were also used. I mean the other ledgers also.

Q. Would you make sure because, if they were used, we have got to offer them in evidence if these are admitted. Make sure before you go on. No. 34 was omitted. Is the other one you mentioned this?

A. Yes, sir.

Q. Will you answer the question, now?

Mr. Winter: These growers' contracts were for one year only. I want to be clear on that point.

A. Yes, these statements were prepared from Exhibits 29 to 33, I believe.

Q. (By Mr. Jones): 34?

A. And 34, yes.

Q. Now, I am also going to hand you the following pre-trial exhibits and ask you if, insofar as you were able to find [87] vouchers to support the book entries, if they are the vouchers summarized on those statements? I will read the numbers off

(Testimony of Frederick Johnson.)

to you here: 37; 39 and 40, 41, 43, 45, 46, 47, 49, 51, 52, 54, 55, 57. If I omitted 41 and 43, I mean to include them. Add No. 38 to that group. What is your answer to that question?

A. I believe that is correct.

Q. Is it correct or not? Look at them until you know.

A. I would have to check each one of these in detail to do that.

Q. Are you acquainted with the vouchers?

A. Yes, I am.

Q. Are they the vouchers that support the statements? A. I am sure they are.

Q. Just take a look at them for a minute.

The Court: Take him off the stand while he is looking at them and put on another witness.

Mr. Garland: I would like to ask the purpose of this.

The Court: Go and make a check of them and then you can have them admitted.

Mr. Jones: Call Mr. Powell.

(Witness temporarily excused.) [88]

BINGHAM POWELL

was thereupon produced as a witness on behalf of the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Jones:

Q. Will you give your full name and address to the Clerk.

(Testimony of Bingham Powell.)

Q. Just speak a little louder, please. Where are you employed?

A. Spencer Packing Company.

Q. How long have you been employed there?—either by Mr. Spencer or as an individual or by some corporation or company that he has been interested in?

A. Since August, 1942.

Q. Prior to being employed by him, for whom did you work?

A. Ladd & Bush Branch of the U. S. National Bank.

Q. Where? A. In Salem.

Q. What experience have you had as a book-keeper?

A. Approximately ten years with various banks.

Mr. Garland: We will agree to his qualifications.

Q. (By Mr. Jones): What relation are you to Mr. Spencer?

A. His son-in-law.

Q. How long have you been married to his daughter?

A. About seven years. [89]

Q. What was your office, if any, elective office, in the Spencer Packing Company of Lebanon?

A. Secretary-Treasurer.

Q. And in the Spencer Dehydrators, Incorporated?

A. The same.

Q. And in the Spencer Packing Company of Yakima?

A. Same.

Q. What did your duties consist of as secretary-treasurer of those three corporations?

A. Well, all duties which would normally fall to those classifications; secondarily responsible for all the records of the corporation.

(Testimony of Bingham Powell.)

Q. Who supervised the bookkeeping of the corporation? A. I.

Q. Did you do any of it personally?

A. I kept Mr. Spencer's personal books.

Q. And you supervised the books of the corporations? A. Yes.

Q. Would you step down and take a look at those books so you can identify them, Exhibits 29 to 34? Look at those so we will know what we are talking about.

Are you acquainted with the transactions recorded in those books during the years you were employed? A. Yes, sir.

Q. Have you gone back and examined into those years in [90] connection with your work?

A. In connection with my work it was necessary to go back to 1942.

Q. Do you know whether or not Mr. Spencer ever made any agreement with Spencer Dehydrators, Inc., concerning the accounts it owed to the Lebanon Corporation?

A. There was a definite agreement.

Mr. Winter: He asked you whether you knew or not. A. Yes.

Q. (By Mr. Jones): Will you give us the details of it?

Mr. Winter: We want to know the time and place and who was present.

The Court: He cannot do it all at once. Go ahead. Answer the question.

(Testimony of Bingham Powell.)

A. About the time that the corporations were formed, I definitely discussed the problem, and again from the standpoint of an officer of the corporations, as to how any moneys advanced by one corporation to the other should be treated, and it was definitely set forth that where, upon Mr. Spencer's instructions, moneys were advanced by one corporation to be used by another, that money should first be repaid by the corporation which received it but it, for any reason, it was unable to do so, Mr. Spencer would pay those funds back.

Q. (By Mr. Jones): When did this conversation take place between you and Mr. Spencer? [91]

A. The best I can say on that is it was approximately the time the corporations were formed.

Q. Where did it take place?

A. The initial discussion must have been in the office of Lebanon, where most of the things were done.

Q. How were the affairs of the corporations conducted with respect to that understanding?

A. They were conducted that way, definitely, as a program to be arrived at. That was a conclusion that we took up or acted towards.

Q. Both corporations understood it?

A. That is right.

Q. And was it followed consistently?

A. It was.

Q. There are some exhibits—I will have to hold up a moment. Counsel is looking at them, but I think we can go along with something else. Do you

(Testimony of Bingham Powell.)

know what activities Mr. Spencer, the plaintiff in this case, engaged in, if any, in addition to his duties as a corporate officer? A. Yes.

Q. Would you state them?

A. He engaged in all of the activities which were necessitated in enlarging and improving the various plants which he was leasing to those corporations. He, further, was responsible for arranging the finances of those corporations. [92]

Q. Can you give us any idea of the value of the additions, if any, he made to the plants during the years he was leasing them?

A. Well, of course, the actual figures are in the records, but I know it was better than a hundred thousand.

Q. Do you know of your own knowledge what understanding, if any, existed between the corporations and Mr. Spencer with respect to signing notes for the corporations? A. Yes, sir.

Q. Would you state it?

A. If for any reason, well, a corporation received money from a note, the corporation was to pay them back. If they could not pay them back, he would do so.

(Answer read.)

Q. How were the affairs of the corporations during this period of time conducted with relation to that?

A. They were conducted in that manner.

Q. Consistently? A. Yes.

(Testimony of Bingham Powell.)

Q. Do you know anything about the labels, or were you there at the end of the—no, you were not there at the end of the fiscal year ending February, 1943, were you?

A. Yes. You say the end of the year?

Q. Do you know anything about inventories of labels that were on hand at the end of that year?

A. Yes, sir.

Q. Will you explain what you know about those and how those were handled?

A. Well, I know that the labels were definitely charged off, written off as being valueless. Subsequently, some of those had been used. The reason for their use is the fact that there was a shortage of labels and labels were not available, and, so, there had been an imprinting done on those labels which could be modified to be used; there are others which are of the wrong size and which still cannot be used. There is also the fact that they are stored in the buildings which are not heated and there is some loss over a period of time from moisture and so forth.

Q. Can the labels that were included in that inventory be used without having new work done on them?

A. No.

Q. When they were written off at the end of the year, February 28, 1943, were they regarded as having any value at all to the company?

A. They were regarded as worthless.

(Testimony of Bingham Powell.)

Q. Are you able to state into the record at this time Mr. Spencer's net worth from any records before us?

A. His net worth, at what time?

Q. During the spring of 1943?

A. From these records, yes. [94]

Q. Will you come down and take such records as you need from the books, and read it into the record?

The Court: Don't you have a financial statement around there some place, a copy of it?

Mr. Jones: No, because we only want to put in the income, expense and the nature of these bills.

The Court: You won't find it in his books?

A. Yes, he has an account of that.

The Court: You know how much it is. How much was he worth? A hundred thousand or two hundred thousand or what?

A. It was better than a hundred.

Mr. Jones: You read that from Pre-Trial Exhibit 33?

Mr. Garland: '43 or '33?

Mr. Jones: '43.

A. Testifying from Exhibit 33 and Exhibit 31.

Q. (By Mr. Jones): What do they show?

A. \$37,000 plus \$65,000.

Mr. Jones: We will offer those two exhibits in evidence.

Mr. Garland: Objected to.

Mr. Jones: We will offer in evidence at this time Pre-Trial Exhibits 29 to 34, inclusive.

The Court: Admitted.

(Books of account thereupon received in evidence and marked Plaintiff's Exhibits No. 29 to No. 34, inclusive.) [95]

Mr. Jones: I would like to have Mr. Johnson resume the stand.

FREDERICK JOHNSON

having been previously duly sworn, resumed the stand as a witness in behalf of the plaintiff, and further testified as follows:

Direct Examination

(Continued)

By Mr. Jones:

Q. Mr. Johnson, have you carefully checked the pre-trial exhibits, which are in the nature of vouchers, against the statements you have prepared?

A. Yes, sir.

Q. Are all of the vouchers, the exhibits in your hands there, that go to support the statements and book entries from which you got your figures?

A. All that could be located are here.

Q. Did you make any search to find any that could not be located? A. Yes, sir.

Q. About how much time did you spend on it?

A. I specifically spent half a day and then I was searching for these missing records at the time I was looking for others which were found.

(Testimony of Frederick Johnson.)

Q. Who helped you in your search?

A. Mr. Bingham Powell.

Q. All of the vouchers that could be found are there? [96]

A. That is correct.

Q. Do the statements that you made directly reflect the figures that are on those books, Pre-Trial Exhibits 29 to 34, the statements you have in your hand? Do they correctly reflect the figures as you found them in the books?

A. Yes.

Q. Pre-Trial Exhibit 35 is a balance sheet, purports to be a balance sheet, is that right?

A. That is right.

Q. A balance sheet of the Spencer Dehydrators just prior to when the corporation was liquidated, is that correct?

A. That is correct.

Q. The figures are all correct and supported by the documents you have mentioned?

A. As far as the documents are available.

Q. Then, Exhibits 35, 42, 44 and 48 are summaries or detailed statements of the liability shown on the balance sheet, is that correct?

A. Yes, of Spencer Dehydrators, Incorporated.

Q. Pre-Trial Exhibits 53, 56 and 58 are detailed statements of certain of the liabilities appearing on those balance sheets, is that correct?

A. Does not include 58. It is correct, excluding 58.

Q. They stop with 56?

A. That is correct? [97]

(Testimony of Frederick Johnson.)

Q. On the first balance sheet mentioned, Pre-Trial Exhibit 35, the back overdraft is not shown, but do you have the bank's own statement to support that? A. That is correct.

Q. Is that also true with respect to taxes payable? Will you look at Pre-Trial Exhibit No.—there is a statement supporting taxes payable?

A. That is right.

Q. Can you explain the details of this sale of the Yakima property as shown on the books? Can you testify to that without looking at Exhibit 56?

A. No, I cannot testify.

Q. Refreshing your memory, will you explain the details of how the proceeds of the Yakima sale were handled?

Mr. Garland: There is no contest on that, no issue.

Mr. Jones: Very well. Then, I am going to offer all these statements at this time, except No. 58, which I will hold up for a special offer, and all of the voucher exhibits which I read into the record, all the vouchers supporting the statement I am offering in evidence.

Mr. Garland: We would like an opportunity to preserve an objection after looking at them. Most of these we have seen for the first time today.

Q. (By Mr. Jones): Pre-Trial Exhibit No. 58, can you explain what that is? [98]

A. That is a summary of Mr. Spencer's account with Spencer Dehydrators, Incorporated, shown on

(Testimony of Frederick Johnson.)

the books, written off as a bad debt, and Spencer Packing Company of Yakima, that was brought about in the same way.

Q. Does that give the details of the two bad debts that plaintiff is claiming in this case?

A. Yes, sir, as shown by the books.

Q. Are the statements that you prepared, Exhibits 35, 36, 42, 44, 48, 50, 53 and 56, those that lead up to and explain Exhibit 58, and show the final analysis of a bad debt? A. Yes.

Q. Is Exhibit 58 the only one that you need to look to to get the final picture of what the bad debt is?

Mr. Garland: We want to object to the characterization. Let the record show that any place that appears, either in question or answer or in these summaries, that it is not to be given significance.

Mr. Jones: I think that is perfectly fair. I am trying to avoid any characterization.

Q. The amounts that Mr. Spencer claims against Dehydrators, Inc., and the Yakima Corporation that we are litigating in this case, whether or not they are bad debts, are those appearing in the summary, Exhibit 58? A. Yes.

Mr. Garland: Where you use the words "bad debt," it should [99] be given no significance.

Mr. Jones: I will come to that.

Mr. Garland: I say, is that correct?

Mr. Jones: Just a second, now. I do not think it appears on this particular one.

Mr. Garland: It appears on 58.

(Testimony of Frederick Johnson.)

Mr. Jones: I am looking at that now.

Mr. Garland: That is the way it is set up at the pre-trial hearing.

Mr. Jones: It is agreed on No. 58 that nothing is claimed in the way of any evidentiary value by the use of the term "bad debt."

Mr. Garland: Let me ask you: Does that same apply to any exhibit you have there?

Mr. Jones: Yes.

Mr. Garland: That is all I wanted to know.

Q. (By Mr. Jones): I do want to ask one question in connection with that, however. Is there any kind of bad debt account in Mr. Spencer's books?

A. Yes, sir.

Q. And these amounts shown on Exhibit 58 of \$73,601.46 and \$33,966.02, have they been charged off as bad debts on that account?

A. The total of \$107,567.51 has. I believe there are three amounts in there. One of them is, I think, \$601.49, [100] the other, \$30.22, and \$33,930 and something.

Q. My question was, specifically: Are the two amounts I named charged off in that account as bad debts? A. Yes.

Q. Do the books show when this liquidation was completed? A. Yes, sir.

Q. What date? A. February 15, 1945.

Q. Do the books show what was paid in as capital? A. Yes.

Q. What? A. The growers' contracts.

(Testimony of Frederick Johnson.)

Q. Do they set a value on those growers' contracts? A. The books do.

Q. What?

A. An amount equal to the capital stock which, in the case of Spencer Dehydrators, Inc., was \$5,000 and in the case of Spencer——

Mr. Winter: I believe that is already in the record.

Q. (By Mr. Jones): Do the books show whether those amounts were written off?

A. Yes.

Q. Completely? A. Yes.

Q. All the growers' contracts were written off?

A. That is correct.

Q. Is there any account in the books anywhere, either of the corporations or of Mr. Spencer's, showing any contribution to capital other than those growers' contracts?

Mr. Garland: That is immaterial.

The Court: He may answer.

A. No.

Q. (By Mr. Jones): Do the books or the records show that the liabilities of the Dehydrators, Incorporated, were taken over or taken up on Mr. Spencer's own books as obligations to be paid by him?

A. Mr. Spencer's books show that those items were regarded as liabilities.

(Testimony of Frederick Johnson.)

Q. Do the records show whether or not all of the amounts which we claim are obligations due him from the Yakima and Dehydrators, Inc., whether they are paid by him?

A. These records show they were all paid with the exception of one item of \$3.68.

Q. Does the record show what he did as to that?

A. That was taken up in his profit and loss account under date of February 28, 1946.

Q. As income to him? A. That is correct.

Q. Do the books indicate whether or not there are any outstanding assets, or any claims for money or anything else [102] belonging to either of the corporations last mentioned which have not been brought into the assets shown on your statement?

A. There was one item recorded subsequently to February 28, 1945, I believe.

Q. What is that?

A. That was the realization of a claim against——

Q. That is the \$12,000 that has been admitted?

A. That is correct.

Q. Was there any other? A. None.

(A short recess was then taken.)

Q. (By Mr. Jones): I will ask you if the records show the date that Mr. Spencer picked up or accrued these liabilities? I asked you if he accrued these liabilities on his books but I did not ask you the date. A. February 15, 1945.

Q. Was that also the date on which the growers' contracts were written off? A. Yes.

(Testimony of Frederick Johnson.)

Q. Was it on that date that liquidation took place?

A. Closed entries on the books of the Yakima and Dehydrator corporations as of the same date, which was February 15, 1945.

Q. And that was the date——

A. ——the liabilities were recorded on Mr. Spencer's books at the same time. [103]

Q. The question specifically is: Is that the date the growers' contracts were written out of the capital account? A. That is correct.

Mr. Winter: The growers' contracts were only written for one year. Just so I understand it and so the Court understands it——

The Court: I understand it. Don't worry about me.

Mr. Winter: I wanted to be sure.

The Court: Be sure for yourself.

Mr. Winter: That is why I wanted to ask that.

Q. (By Mr. Jones): Referring again to this Exhibit 56, which shows the disposition of the proceeds of the sale of the Yakima plant, I want you to state whether or not that exhibit accurately shows just where all of the proceeds went, if it details where all the proceeds went?

A. It does.

Q. Some of those proceeds went to pay Dehydrators and one previously went to pay a bill of C. B. Spencer's personally. Do the books show whether or not the Yakima Corporation received

(Testimony of Frederick Johnson.)

credit for all sums, for all amounts that were paid out of those proceeds that did not go to pay its own obligations?

A. The books do show that Yakima received credit for such items.

Q. In other words, if it paid out for the benefit of [104] Dehydrators, those companies gave credit?

A. That is correct.

Q. Or else it charged those companies for it?

A. That is right.

Q. I asked you if there was any kind of a book that showed any contribution other than growers' contracts to capital, but I did not include the word "payment."

Was there any payment of any money or anything else? I do not want to just limit it to the word "contribution." I want to know if there was any money or anything else that went into any capital account, or any account like a capital account, other than the growers' contracts?

A. There was none.

Q. Do the books show on what basis Mr. Spencer keeps his account?

A. His account—his books are kept on an accrual basis.

Q. That shows in the books themselves?

A. It is obvious, I would say.

Q. A time or two I probably used the words, in examining you, "picking up a liability." What do you understand I meant by that?

(Testimony of Frederick Johnson.)

A. By "picking up a liability" I would say it means accruing a liability.

Q. And that is how you used the term?

A. Yes. [105]

Mr. Jones: I have made an offer of these statements that we had prepared, together with the vouchers that support them, and I suppose I can renew that offer after we have checked these exhibits over. Will you check them so I can make my offer?

The Court: Proceed with the cross-examination.

Cross-Examination

By Mr. Garland:

Q. The books in evidence, the books of Mr. Spencer, do they show any cost basis of the growers' contracts to the Dehydrators, Inc., or Yakima Corporation?

A. I do not recall checking for that specifically. I would presume they do. I would answer that by looking at the books.

Q. How long would it take?

A. Well, I don't know. I would be glad to take a look and see what I can find.

Mr. Garland: The books are in evidence. We will withdraw the question. That is all.

(Witness excused.) [106]

BINGHAM POWELL

having previously been duly sworn, was recalled as a witness on behalf of the plaintiff and was examined and testified as follows:

Direct Examination

By Mr. Jones:

Q. When Mr. Spencer would tell you about a transaction that originated with him, what would you do about it?

A. I would enter it in the books.

Q. You entered all transactions which he called to your attention? A. Yes.

Q. And all transactions which you knew about?

A. Yes.

Mr. Jones: As far as I know, the income is not challenged. I won't go into that.

Mr. Winter: It is challenged insofar as additional assessments are concerned.

Mr. Jones: Oh, yes.

Mr. Winter: We have introduced certified copies of the assessments.

Mr. Jones: Yes, that is right.

Q. Are you acquainted with the details of the various transactions recorded in these books and received in evidence, the exhibits that Mr. Johnson prepared and testified about? A. Yes. [107]

Q. You have looked these exhibits over?

A. Yes.

Q. Did you help search for the few missing papers, vouchers? A. I did.

(Testimony of Bingham Powell.)

Q. Approximately how much time did you put in?

A. Well, I put in quite a lot of time, because I searched off and on over several weeks at different times and, even while I was looking for one thing, I would keep other things in mind for which we were searching.

Mr. Winter: We have agreed on the amount.

Mr. Jones: That is right. Nothing further on that.

Q. As you left the stand, you testified about Mr. Spencer's activities other than as officer or director of the corporations. Approximately how much time would he expend in such activities?

A. He spent a great deal, anywhere from thirty to forty per cent.

Q. Did he receive any salary as an officer of any of the companies? A. No.

Q. Or as a director? A. No, sir.

Q. I think you had just started to detail what he did. I wish you would elaborate upon that a little bit. That is something that might be of importance in this case. [108]

A. Well, one of the things was expanding the plant, which meant construction of buildings and purchasing of materials, also the purchase of machinery that went into those buildings, the arrangement and redesigning of existing plant to conform with those additions. At that time, equipment and machinery was quite difficult to get. We had the problem of priorities entering into it and he spent

(Testimony of Bingham Powell.)

some time in searching for items which he wanted to use. Beyond that, at times it was necessary to travel, perhaps to Washington, relative to priorities, or to California relative to contracts with machinery companies in the purchasing of these machines, numerous things along that line.

Q. All those machines and plants, were they owned by him as an individual?

A. They were.

Q. They were on the leases with the canneries?

A. Yes.

Q. Do you know approximately what the dollar volume of the promissory notes he signed would amount to?

Mr. Garland: Objected to. The notes are in evidence, your Honor.

Q. (By Mr. Jones): Do you know approximately how many of those notes he signed? They are not all in evidence.

A. Well, they would be hundreds.

Q. This question has been asked twice, but you know best of [109] all. Mr. Spencer's books were on an accrual basis?

A. Yes.

Q. What was the intention of the directors when the growers' contracts were transferred in payment of the capital stock, as to whether or not it was full payment, do you know?

A. It was definitely accepted as full payment.

Q. Full payment of the capital stock?

A. Yes.

(Testimony of Bingham Powell.)

Q. Did either Yakima or Dehydrators make any money? A. No, sir.

Q. Both operated at a loss?

A. Both operated at a loss, yes.

Q. Will you state the plan of liquidating the two corporations?

A. In the case of Dehydrators, the reason for liquidation was definitely no further necessity for the product that it was producing—had been producing at a loss—and, in checking with Government agencies that had been taking this product, Spencer was definitely advised that there was no use attempting to operate further; it was definitely indicated that there wasn't to be a commercial market for that product and, therefore, no reason at all to operate.

The Court: What was your dollar volume in those two plants?

A. I would have to look at the books on that.

The Court: Well, how much, about? How many employees did you have?

Mr. Jones: What year?

The Court: I don't care, any year. Twenty-five, fifty or a hundred?

A. Well, Dehydrators must have had in the neighborhood of a hundred and Yakima probably had several hundred, three or four hundred.

The Court: Give the dollar volume for any year. Did you have contracts that were to be paid in terms of dollars? Dollar value?

A. The easiest way to show that would be to check the dollar sales.

(Testimony of Bingham Powell.)

The Court: I do not want to check anything. I want you to tell me. Did you sell a million dollars in any year or two million dollars worth?

Mr. Jones: You know what the sales were at Yakima.

The Court: You had a hundred employees at one plant and three or four hundred at another. You must have sold a lot of stuff.

Q. (By Mr. Jones): At Yakima, what was the reason they closed up?

A. There had been an unprofitable season and it was brought about, to a great extent, by shortage of labor and a combination of high prices for fruit, cans, and controlled prices [111] for the finished product, and the plant had to operate at full capacity in order to be economically feasible, and there was definitely every reason to think that labor was going to be more difficult to secure later, rather than easier.

Q. What was the plan of liquidating?

A. In Yakima, the plant was sold by Mr. Spencer in the summer. The funds were——

Q. The summer of what year?

A. 1944, and the funds from that sale were applied by the corporation, first, to all general creditors and then, secondly—some were held by ABC for Spencer Dehydrators and Spencer of Lebanon's note, and then there were a very few assets which were liquidated during that summer. In February, any assets and liabilities which remained or, rather,

(Testimony of Bingham Powell.)

any assets which remained were taken by Mr. Spencer and, with one exception all the remaining liabilities were against him.

Q. What is that?

A. With one exception, the remaining liabilities were against him, and he charged that liability off.

Q. The assets taken over, how were they applied in Yakima? What did he do with the assets?

A. Any assets taken over were applied against the indebtedness which they owed to him. [112]

Q. In the full amount?

A. To any amount that was ever realized. Yes.

Q. With respect to Dehydrators—

A. In the case of Dehydrators, he took over the assets, applied them specifically against Dehydrators' liabilities and then he paid the balance of the liabilities himself, charging the difference to bad debts. The only other thing, several months later, in an audit by War Foods it disclosed—

Q. That has all been admitted in evidence. I started to ask you—I did not quite finish. These transactions that you could not find the missing vouchers for, how long would it take you to get the information out of the books?

The Court: No. You ask Mr. Spencer over here. Ask Mr. Spencer. He knows what the business was.

Mr. Jones: Mr. Spencer, do you know what the sales for Yakima were in 1943?

Mr. Spencer: I think between seven hundred thousand and a million dollars. As far as employees were concerned, we had some six hundred employees

(Testimony of Bingham Powell.)

at the Yakima operation and over a hundred at the Dehydrators' operation and practically six hundred at the Lebanon operation.

The Court: Were you the biggest employer in Lebanon?

Mr. Spencer: No, sir. Yes, we were the largest employer in Lebanon. We were exceeded in Yakima by both [113] Libby——

Q. (By Mr. Jones): All the amounts that go to make up the claims that Mr. Spencer is making against the Yakima and Dehydrators, do those amounts represent the expenditures made by those two corporations? Do those amounts represent obligations incurred by those two corporations?

A. Yes.

Q. For what purpose?

A. Normal course of business.

Q. Operating expenses? A. Yes.

Q. Were any of them for capital assets?

A. None represent capital assets.

Q. These books here, Exhibits 29 to 34, they are all books belonging either to Mr. Spencer or the corporations as indicated on the outside of them?

A. Yes.

(Balance Sheet, Spencer Dehydrators, Inc., February 15, 1945, thereupon received in evidence and marked Plaintiff's Exhibit No. 35.)

(Statement of Notes Payable, ABC, Spencer Dehydrators, Inc., thereupon received in evidence and marked Plaintiff's Exhibit No. 36.)

(Testimony of Bingham Powell.)

(Statement of Accounts Payable, Miscellaneous, Spencer Dehydrators, Inc., thereupon received in evidence and marked Plaintiff's Exhibit No. 42.)

(Statement of Accounts Payable, Spencer Dehydrators, Inc., Paid by C. B. Spencer, thereupon received in evidence and marked Plaintiff's Exhibit No. 44.)

(Statement of Taxes Payable, Spencer Dehydrators, Inc., thereupon received in evidence and marked Plaintiff's Exhibit No. 48.)

(Balance Sheet, Prior to Recording Closing Entries, Spencer Packing Company of Yakima, thereupon received in evidence and marked Plaintiff's Exhibit No. 50.)

(Statement of Accounts Receivable from Spencer Packing Company of Yakima thereupon received in evidence and marked Plaintiff's Exhibit No. 53.)

(Statement of Disposition of Proceeds from Sale of Yakima properties thereupon received in evidence and marked Plaintiff's Exhibit No. 56.)

(Summary of Bad Debts Claimed against Spencer Dehydrators, Inc., and Spencer Packing [115] Company of Yakima thereupon received in evidence and marked Plaintiff's Exhibit No. 58.)

Mr. Jones: You may cross-examine.

(Testimony of Bingham Powell.)

Cross-Examination

By Mr. Garland :

Q. You have spoken of the activities of Mr. Spencer. A. Yes.

Q. After the corporations were formed?

A. Yes.

Q. These activities that you speak of, were those of a president and manager of a corporation, were they not?

A. I did not have that impression, sir.

Q. What were they?

A. Like I reiterated——

Q. I don't care for you to restate what they were, but were they not the ordinary activities of a president and manager of a cannery plant?

A. The particular companies did not own any capital assets and, therefore, there would be no way that their president would be involved in the purchasing or building and such things as that.

Q. Every president is involved in managing and operating a cannery. Were his activities those you would expect in a person in that position? [116]

A. I was talking primarily about his activities relative to expansion of the plant.

Were the growers' contracts carried on the personal books of Mr. Spencer at any value?

A. No, sir.

Q. Was the stock of Dehydrators carried on his books at any value? A. Yes.

Q. What value? A. Par value.

(Testimony of Bingham Powell.)

Q. What was that? A. Dehydrators?

Q. Yes. A. Dehydrators was \$5,000.

Q. Was the stock of the Yakima plant carried at any value? A. At par value.

Q. And that was the same? A. \$10,000.

Q. Are you familiar with the Federal income tax returns for the fiscal year ending February 28, 1945, of Mr. Spencer?

A. I did not prepare his tax statement.

Q. Are you familiar with whether or not there was any deduction shown for capital loss on account of the stock of the Dehydrators, Inc., and the Yakima Corporation?

A. I hardly think I would be qualified to answer that [117] question.

Mr. Garland: May the record show that there was none claimed on the income tax return for the fiscal year ending February 28, 1945? That is all.

(Witness excused.)

Mr. Jones: There is one exhibit here, No. 73, which was prepared by Mr. Johnson from the books. It is a depreciation schedule. You have admitted all the figures. The only reason I want this in is that it shows the dates and the amounts of the acquisitions. I would like it in evidence. I believe I will offer it. I will call Mr. Johnson and have him testify to it.

Mr. Winter: His returns which are in evidence will show the depreciation which you claim. There is no issue about depreciation.

Mr. Jones: Have you checked against the returns? Are all the items on the returns?

Mr. Garland: I do not think it is material. There is no depreciation question involved.

Mr. Jones: We are only offering it to show acquirements, the acquirements shown by this column of additions. I am offering it for the purpose of showing exactly what we acquired.

Mr. Winter: You mean assets acquired and used by these [118] corporations?

Mr. Jones: Assets which Mr. Spencer personally bought and were owned by him and rented to the corporations.

Mr. Winter: May I see the Revenue Agent's report?

Mr. Jones: I am offering it for the limited purpose of showing the amount of the machinery and plant facilities acquired during the years we claim he was engaged in the business of leasing the plants.

The Court: Admitted.

(Tabulation in longhand entitled "Depreciable Assets and Related Depreciation, Year Ending February 28, 1943," thereupon received in evidence and marked Plaintiff's Exhibit No. 73.)

Mr. Jones: With the exception of renewing our offer of the exhibits identified at the pre-trial and which have not so far been received, we are ready to close our case. I would like an opportunity of checking those to make sure.

Mr. Garland: Going to introduce the Revenue Agent's report?

Mr. Jones: I introduced the Revenue Agent's report, but these things that you have produced have not yet been marked. I can look these over and introduce them later.

The Court: No.

Mr. Jones: Introduce them in the morning.

The Court: No, we are going to finish tonight.

Mr. Winter: It may be understood that the Revenue Agent's report may be admitted, if it has not already been?

The Court: Yes.

Mr. Jones: In order to speed it up, your Honor, and make sure that I have got all my exhibits in, I am going to offer——

The Court: All right. I will tell you how to speed it up. Plaintiff is resting, subject to reopening if you find you have omitted something. Put on your case for the Government.

Mr. Garland: I would like to introduce, if the Court please, the assessment lists heretofore offered for identification as Pre-Trial Exhibits 74 and 75.

The Court: Admitted.

(Certified copy of assessment list, December, 1946, against C. B. Spencer, thereupon received in evidence and marked Defendant's Exhibit No. 74.)

(Certified copy of telegraphic assessment, C. B. Spencer, thereupon received in evidence and marked Defendant's Exhibit No. 75.)

Mr. Garland: We would like to renew our request that the case remain open until we can take our depositions. [120]

Mr. Jacobs: On that point, if I may be heard, whose depositions are to be taken?

Mr. Winter: We want to take the deposition of H. G. Bauer, Alice Berry and two bankers. I will give you their names. A. R. Munger and C. R. Watkins. They all live in Seattle. However, the Alice Berry deposition will have to be taken at Yakima. The others may be taken at Seattle. We would like to take the depositions on oral interrogatories.

Mr. Jacob: Depositions have already been taken of all of these parties. The special agent is here who took those depositions and photostatic copies were made of all records of H. G. Bauer that are pertinent and at the time the depositions were taken Mr. Winter was notified that they were to be taken.

The Court: How soon can you take these depositions?

Mr. Winter: Next week, your Honor.

The Court: Can you take them next week?

Mr. Jacobs: I believe we can.

Mr. Winter: I don't know the name of a Reporter that I can get in Seattle, or a Notary Public, but I will ascertain and I will possibly want to take the same Notary over to Yakima to take the deposition over there.

Mr. Jones: Some of these exhibits that you have I wish to offer in evidence, and I would like to know that all pre-trial exhibits that have not been formally offered are [121] in. Those starting at No. 65 and on I believe have already been admitted, but below No. 65, I am offering them all in evidence.

The Court: All admitted.

Mr. Jones: All admitted? Thank you.

(The following plaintiff's pre-trial exhibits were thereupon received in evidence and marked as follows:)

Plaintiff's

Exhibits:

Description

- 3 Certificate of Necessity.
- 18 Letter August 18, 1943, Food Distribution Administration to Spencer Packing Company of Lebanon.
- 19 Letter of February 3, 1944, Food Distribution Administration to Spencer Packing Company of Lebanon.
- 20 Copy of Negotiated Contract, August 22, 1944, War Food Administration and Spencer Packing Company of Lebanon.
- 22 Copy of letter May 10, 1945, C. B. Spencer to Commissioner of Internal Revenue—Election to Terminate Amortization Period.
- 23 Letter May 28, 1945, Treasury Department to C. B. Spencer, re: Non-Necessity Certificate File.
- 24 Certified copy Individual Income Tax Return, February 28, 1942, C. B. Spencer.
- 37 Vouchers supporting statement of notes payable, \$11,261.19—Spencer Dehydrators.
- 41 Check March 6, 1945, \$9,934.02, C. B. Spencer, payable to First National Bank of Lebanon.
- 43 Voucher supporting Exhibit No. 42.
- 45 Vouchers supporting Exhibit No. 44.
- 46 Vouchers supporting Exhibit No. 44.
- 47 Vouchers supporting Exhibit No. 44.
- 49 Vouchers supporting Exhibit No. 48.

Plaintiff's

Exhibits:

Description

- 51 Accounts Payable, Yakima Corporation — Sunnyside Packing Company.
- 52 Statement and letter regarding Yakima account, Personal Property Taxes Levied on Exhibit 50.
- 54 Vouchers—Rent Charged on Exhibit 53.
- 55 Vouchers supporting other items on Exhibit 53.
- 57 Vouchers supporting Exhibit No. 56.
- 59 Articles of Incorporation, Spencer Packing Company of Lebanon.
- 60 Articles of Incorporation, Spencer Dehydrators, Inc.
- 61 Articles of Incorporation and Minutes of First Meeting of Board of Directors of Yakima Corporation.
- 62 Form of Growers' Contract.
- 63 Revenue Agent's Report.
- 64 Transcript of Proceedings before Judge Fee July 8, 1945.

(Adjournment.)

[Title of District Court and Cause.]

Reporter's Certificate

I, Ira G. Holcomb, Reporter pro tem of the above-entitled Court, do hereby certify that on Tuesday, the 17th day of December, A.D. 1946, I reported in shorthand certain proceedings occurring in the trial of the above-entitled case; that I thereafter caused my shorthand notes to be reduced to typewriting, and that the foregoing transcript, consisting of 124 pages, numbered 1 to 124, both inclusive, constitutes a full, true and accurate transcript of said proceedings so taken by me in shorthand on said date, as aforesaid, and of the whole thereof.

Dated this 7th day of January, A.D. 1947.

/s/ IRA G. HOLCOMB,

Reporter pro tem.

[Endorsed]: No. 11834. United States Circuit Court of Appeals for the Ninth Circuit. J. W. Maloney, United States Collector of Internal Revenue for the District of Oregon, Appellant, vs. C. B. Spencer, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed January 19, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11834

J. W. MALONEY,

Appellant,

vs.

C. B. SPENCER,

Appellee.

ORDER

This matter coming on to be heard this date upon motion of Henry L. Hess, United States Attorney for the District of Oregon, and Floyd D. Hamilton, Assistant United States Attorney, for an Order extending time for filing of the record and docketing the appeal in the within action for the reason that appellant has filed in the District Court a Designation of Contents of Record on Appeal and a Statement of Points upon which Defendant Intends to Rely on Appeal but the District Court will not be able to prepare and docket the record on appeal in the Circuit Court of Appeals within the time set therefor, and the Court having considered said motion and supporting affidavit and being advised in the premises,

It Is Ordered that the time for filing the record on appeal in the within action be, and it is hereby, extended thirty (30) days from and after December 18, 1947.

Made and entered at San Francisco, California, this 18th day of December, 1947.

/s/ FRANCIS A. GARRECHT,

Judge.

[Endorsed]: Filed December 18, 1947.

[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S STATEMENT OF POINTS ON
WHICH HE INTENDS TO RELY ON AP-
PEAL AND DESIGNATION OF RECORD
FOR PRINTING.

Comes now J. W. Maloney, Collector of Internal Revenue for the District of Oregon, appellant above named, and for a statement of points upon which he intends to rely on this appeal says:

The statement of points to be urged by appellant in this Court are the same as those set forth in the statement of points filed with the District Court pursuant to Rule 75 (d) of the Federal Rules of Civil Procedure.

Appellant designates for printing the entire record filed with this Court except the transcript of proceedings of February 25, 1947, which relates solely to issues from which no appeal is being taken.

Dated this 15th day of January, 1948, at Portland, Oregon.

HENRY L. HESS,

United States Attorney for
the District of Oregon.

/s/ FLOYD D. HAMILTON,

Assistant United States
Attorney.

State of Oregon,
County of Multnomah—ss.

Due service of the foregoing Appellant's Statement of Points on which he Intends to Rely on Appeal and Designation of Record for Printing to the United States Circuit Court of Appeals for the Ninth Circuit is hereby accepted at Portland, Oregon, this 15th day of January, 1948, by receiving copy thereof, duly certified as such by Floyd D. Hamilton, Assistant United States Attorney, of Attorneys for Appellant.

/s/ RANDALL S. JONES,
Of Attorneys for Appellee.

[Endorsed]: Filed January 19, 1948.

